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IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS X. OROFINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When a denial of the Sixth Amendment right to effective assistance of counsel has been demonstrated based upon insufficient time to prepare a complex fraud prosecution for trial, must prejudice be demonstrated before relief will be granted?

2. When a denial of the Sixth Amendment right to effective assistance of counsel has been demonstrated based upon insufficient time to prepare a complex fraud prosecution for trial, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted?

3. What minimum standard of competency must be displayed by a defense counsel in a criminal case, in order to satisfy the Sixth Amendment requirement of effective assistance of counsel?

4. Should this Court resolve a split of authority among the Courts of Appeal regarding each of the preceding questions?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Francis X. Orofino petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not reported.

JURISDICTION

The opinion of the Court of Appeals was entered on June 20, 1983, and a petition for rehearing was denied on July 21, 1983 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

STATEMENT

On July 14, 1982, the petitioner and four co-defendants were charged in a 15 count indictment with mail fraud in violation of title 18 U.S.C. 1341, wire fraud in violation of 18 U.S.C. 1343, sale of unregistered securities in violation of 15 U.S.C. Sections 77e and 77x, inducing investors to travel in interstate commerce in execution of a scheme to defraud in violation of 18 U.S.C. 2314, securities fraud in violation of 15 U.S.C. Sections 78j(b), 78ff, and 14 C.F.R. 240.10b-5 and a conspiracy encompassing all of the above offenses in violation of 18 U.S.C. 371. The allegations of the indictment principally involve activities of a publicly traded corporation, Tellco Information Service, Inc. ("Tellco"), its wholly owned subsidiary Vitorio Widemann International ("VWI"), and an Italian cotton factory, Cotonificio Vitorio Widemann & Co. ("Cotonificio"), during the period of April through September, 1977.

It is alleged that the defendants sold promissory notes of VWI convertible into Tellco stock by misrepresenting to the investors that VWI was the owner of Cotonificio; that Tellco was a promising new company which by acquiring other companies would become a mini-conglomerate worth millions of dollars,

and by failing to disclose that Cotonificio was in desperate financial straits and had suffered losses in the past two years and that Tellco did not intend to contribute capital to Aegis Print Works, Inc. ("Aegis") as required by the agreement through which Tellco had acquired Aegis.

It is further alleged that the proceeds of the sales of convertible promissory notes were used to purchase the stock of Tellco on the over-the-counter market, in order to artificially inflate the price of Tellco stock, and that the promissory notes were not registerd with the Securities and Exchange Commission.

Finally, it is alleged that Forsyth and Orofino fraudulently entered into agreements to purchase raw cotton for Cotonficio from two cotton dealers, Volkart and Molsen and through misrepresentations induced these dealers to deliver cotton which was not fully paid for or which was paid for in part through checks drawn on bank accounts with insufficient funds.

The allegations of the indictment were the subjects of investigations by three Federal agencies: The Securities and Exchange Commission, the United States Attorney's Office for the Southern District of New York, and the Federal Bureau of Investigation, spanning five years.

On September 22, 1977, the Securities and Exchange Commission suspended the trading in Tellco stock. In fact, the SEC had commenced an investigation of Tellco prior to that date and the investigation continued until December 6, 1979, when a civil action was commenced in the United States District Court for the Scuthern District of New York, *SEC v. Tellco*,

et al., 79 Civ. 6649 (CSH), (App. C, *infra* at 8a).

The SEC conducted an in depth investigation which included taking testimony from more than fifty people and requiring the production of numerous books and records.

Also in 1977, the Federal Bureau of Investigation began to receive information about Norman Forsyth and Francis X. Orofino in the course of an investigation of "sophisticated white collar criminal activity." (*Id.* at 8a). On December 6, 1977 the Federal Bureau of Investigation and the United States Attorney's Office for the Southern District of New York requested access to the SEC's Tellco file. On February 21, 1978, the SEC permitted the FBI and the United States Attorney to have access to the Tellco file. Over the course of the next twenty-two months, the FBI conducted an extensive investigation which culminated in submission of a one hundred forty page prosecutive memorandum to the United States Attorney's Office on December 27, 1979. With the FBI's one hundred forty page report in hand and with the availability of thousands of pages of transcripts generated by the SEC investigation, the United States Attorney's Office opened a formal file on the Tellco case on March 13, 1980. (*Id.* at 9a).

For the next twenty-eight months the investigation was continued by the United States Attorney's Office assisted by the FBI and at least one compliance examiner of the SEC. Dozens of witnesses were interviewed and considerable evidence was presented to grand juries, but no indictment was returned until July 14, 1982, because the assistant united states attorney assigned to the case was too busy to devote the

time necessary to complete the grand jury presentation "because (of) its complexities." (*Id.* and Tr. at 346).[1]

By August 9, 1982, the petitioner had been represented by two lawyers appointed by the United States Magistrate pursuant to the Criminal Justice Act 18 U.S.C. 3006A (CJA). The first lawyer asked to be relieved because "the papers were so extensive that he would not have the opportunity to properly represent (the petitioner) within the time limits available to him for that purpose." At that time the trial was scheduled to commence on September 30, 1982, at least seven and one-half weeks from the date upon which the first lawyer was relieved. The second attorney appointed by the Magistrte pursuant to the CJA was disqualified by the trial judge on August 9, 1982, because Mr. Orofino had gross income of $48,000.00 per year (8/9/82 tr. at 1).[2] Mr. Orofino was told that he should retain counsel within ten days and that the trial had been adjourned on motion of the counsel for Co Defendant Forsyth to October 18, 1982 (*Id.* at 2).

During the subsequent court appearances Mr. Orofino informed the Court that he had spoken with several attorneys but could not retain counsel because he was unable to raise sufficient funds for a retainer and that the generation of monies by his business was slow. No attempt was made by the prosecution or the Trial Court to determine what assets Mr. Orofino possessed to retain counsel or to establish his ad-

1. All parenthetical references with the prefix "Tr." refer to the trial transcript.

2. "8/9/82 tr." refers to the transcript of the pre-trial conference held on that date.

justed gross income. Instead, the Court repeatedly warned Mr. Orofino that he would be forced to proceed *pro se* if he did not retain counsel, to which Mr. Orofino replied that he was not prepared to defend himself in a complex litigation and that he would do his best to retain counsel. (9/8/82 tr. at 3-6, and 9/21/82 tr. at 3-5).[3]

Mr. Orofino was finally able to raise the bare minimum necessary to retain private counsel on September 28, 1982, 21 days before trial commenced. Trial counsel had to prepare to meet a complex, multi-pronged indictment involving at least three corporations operating on two continents. The United States Attorney's office made available five cardboard boxes of exhibits including books, records, contracts, bank statements, checks, telexes, financial statements, etc., totalling in the thousands of pages of documents. In addition, counsel had access to approximately 5,000 pages of SEC transcripts relevant to the instant case.

Defense counsel's ability to adequately prepare for trial was further complicated by the following facts. During trial preparation counsel spent two days in Italy where depositions of two government witnesses were conducted. He was required to review affidavits, applications and a court order authorizing electronic surveillance pursuant to Title 18 U.S.C. Section 2518 in order to prepare a motion to suppress conversations of the petitioner which the government offered into evidence at trial. Further, defense counsel had to review concensual tape recorded conversations between the petitioner and an undercover FBI agent which the government proposed to use in cross-examination should petitioner testify. Finally, counsel

3. "9/18/82 tr." and "9/21/82 tr." refer to the transcripts of pretrial appearances on the date indicated.

spent many days in preparation for two proposed government witnesses who were not called to trial. James Sherlock, an unindicted co-conspirator, whose testimony before the Security and Exchange Commission, the Attorney General of the State of New York and the Grand Jury was the most extensive of any proposed government witness was never called to trial. And while the government indicated initially that it would call Fred Pro, the subject of the aforementioned electronic surveillance, as a witness to trial the government ultimately indicated that Mr. Pro would not be a witness.

A motion for a 30 day continuance of the trial date based upon counsel's inability to adequately prepare a defense was heard by the Court on October 15, 1982 and denied (10/15/82 tr. *infra*).[4] Also, during the afternoon of Friday, October 15, 1982, the government delivered approximately 5,000 pages of 3500 material to defense counsel.[5]

The trial commenced on October 18, 1982. During the course of the trial the prosecution offered the testimony of 20 witnesses and moved into evidence 115 exhibits.

The government offered proof that from April through September 1977 investors purchased VWI notes convertible to Tellco stock without having been informed that the Italian cotton mill Cotonificio was experiencing financial difficulties and had been shut

4. "10/15/82 tr." refers to the transcript for the motion for continuance.

5. Some of the 3500 material duplicated SEC transcription previously in the possession of defense counsel.

down for a period of time. (tr. 55-84, 99-108, 171-73, 185-88, 298-22, 238-42, 246-58, 263-70 and 313-29).

Testimony was also presented that cotton brokers had sustained losses either through the shipment of cotton to Italy which remained undelivered at a time when world cotton prices were declining or because some checks issued by VWI and signed by Norman Forsythe had been returned for insufficient funds (tr. 8-11, 13-14, 23-29, and 31-49).

The defense attempted to establish a good faith defense (tr. 288-89 25-96, and 302-303). The defense case consisted of an expert witness to testify that certain notes issued by the Lombard Capital Corporation to an investor were not signed by the petitioner although they bore his name (tr. at 357-61). The petitioner was convicted of ten counts and sentenced to current terms of five years imprisonment, 5 years probation and a fine of $73,000.00.[6]

The Court of Appeals in an unreported opinion held that the trial Court did not abuse its discretion in denying the application for a continuance "given the brief duration of the trial, the straight forward nature of the government's proof, and the relative insignificance of the incidents of prejudice alleged by appellant. . . ." And that the trial court's conclusion that appellant was capable of financing his defense was not clearly erroneous based upon petitioner's

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6. The securities fraud count was dismissed upon motion of the government before trial and four counts were dismissed at the close of the government's case when the government conceeded that it had not called the specific investors involved in those charges.

"failure to show why his cash flow situation rendered him financially unable to retain counsel. . . ." (App. A, *infra*, at 1a-2a).

REASONS FOR GRANTING THE PETITION

This case presents questions of fundamental importance to the administration of criminal justice in the federal courts: First, whether prejudice must be demonstrated when a denial of the Sixth Amendment right to the effective assistance of counsel is predicated upon insufficient time to prepare for trial; second, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted; and finally, what minimum standard of competency must be displayed by a defense counsel in a criminal case in order to satisfy the Sixth Amendment requirement of effective assistance of counsel.

Despite the fundamental nature of these issues, there exists no clear consensus among the Federal courts of Appeal.

The first issue presented is currently before this court. In *United States v. Cronic*, 675 F2d 1126 (10th Cir. 1982), *cert. granted*, 82-660, the United States Court of Appeals for the Tenth Circuit addressed this issue in a case which is factually indistinguishable from the instant case.[7] The Tenth Circuit concluded

7. In fact, in the instant case the defendant had less time to prepare for trial than in *Cronic* (21 days as opposed to 25) and faced a factually and legally more complex litigation. (The instant case involved three corporations on two continents; between five and ten thousand pages of 3,500 material and documentary exhibits; conducting depositions in Italy; preparation of complex motions to suppress the fruits of court authorized electronic

that Cronic's conviction must be reversed because he was deprived of effective assistance of counsel when the trial court allowed twenty-five days for preparation of a multi-count mail fraud prosecution.

It is thus clear that if the instant case had been decided in the Tenth or Sixth Circuits,[8] the petitioner's conviction would have been reversed and the case would have been remanded for a new trial.[9]

The Tenth Circuit's analysis of the prejudice issue should be adopted by this court because it is both logical and the only realistic way to ensure meaningful and effective representation in criminal cases where the issue of ineffective assistance of counsel is predicated upon insufficient preparation. As stated by the Court in *Cronic:*

> "When circumstances impair a given lawyer's preparation of a defendant's case, the defendant need not show specific errors in the conduct of his defense in order to show ineffective assistance of counsel. See *United States v. King,* 664 F.2d 1171, 1173-73 (10th Cir. 1981); *United States v. Golub*, 638 F.2d 185, 187 (10th Cir.), *reversed on other grounds,* 699 F.2d 207 (10th Cir. 1982). This is an imminently reasonable rule, for there is no way an Appellate Court can say precise-

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surveillance; and the need to understand business practices and accounting procedures in both Italy and the United States, involving the cotton brokerage and cotton manufacturing industries.)

8. *Beasley v. United States,* 491 F.2d, 687 (6th Cir. 1974).

9. In view of the almost identical factual contents of the instant case, and in *United States v. Cronic, Supra,* it may be appropriate for this Court to either join these cases for argument or to hold this petition pending the decision in *Cronic.*

ly how a given case would have been handled by a reasonably diligent and properly prepared lawyer. Prejudice for lack of preparation and experience cannot be nicely weighted." *United States v. Cronic, supra*, at 1128.

Finally, the *Cronic* Court recognized that this rule does not conflict with the holding of this court in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665, 66 L.Ed. 2d 564 (1981). *Morrison* involved the invocation of the most drastic remedy when the Court of Appeals had dismissed the indictment, based upon pre-trial interviews of the defendant outside the presence of counsel which yielded no inculpatory statements. Based upon the fact that the constitutional violation could not even theoretically have effected the trial processes, this Court concluded that dismissal of the indictment was inappropriate. *United States v. Morrison, supra*, 449 U.S. at 365.

In contrast, a denial of effective assistance of counsel based upon inadequate time to prepare for complex litigation is fraught with danger which cannot be retrospectively evaluated without speculation. Nevertheless, the circumstances are such as to permit the reasonable inference that a substantial threat of prejudice may be inferred.

Even if this Court should conclude that prejudice must be demonstrated before relief will be granted, it will still be necessary to resolve a conflict among the Circuits concerning the kind and degree of prejudice which must be shown.[10]

10. The cases are collected and discussed by the Fifth Circuit in *Washington v. Strickland*, 673 F.2d 879, 896-900 n. 11-n.20 (5th

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Cir. 1982).

11. In *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (3d Cir. 1970), the Third Circuit noted that the ineffective assistance inquiry cannot stop with a determination as to whether counsel departed from the standard of normal competence:

> In many instances ineffective assistance of counsel may have had so pervasive an effect on the process of guilt determination that it is impossible to determine accurately the presence or absence of prejudice. In other cases changes in circumstances since the original proceedings beyond petitioners' control, such as the death of a witness who was not called, may make it impossible at the time of the habeas corpus petition to determine prejudice. In such instances a finding of departure from the standard of normal competence requires without more, a new trial. In other cases the failure of counsel may be with respect to a narrow issue or area, and it may well be possible, in the habeas corpus proceeding, to determine whether or not the departure from normal competence was prejudicial .... When a habeas petitioner alleges as a ground for relief the failure of counsel to exercise normal competence in presenting specific trial evidence it is reasonable, we think, to put on petitioner the burden of showing that the missing evidence would have been helpful.

Id. at 1115.

In subsequent cases, the Third Circuit has denied habeas relief when it was clear that no prejudice had been shown. *E.g., United States v. Swinehart*, 617 F.2d 336, 341 (3d Cir. 1980) (no prejudice from failure to file suppression motion because motion would have properly been denied; no prejudice from failure to object to prosecutorial suggestion of defendant's guilt because defendant was not prejudiced by comments). The court has also applied the harmless error doctrine to certain ineffective assistance claims. *E.g., United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 177 (3d Cir.), *cert. denied*, 425 U.S. 997, 96 S. Ct. 2214, 48 L.Ed.2d 823 (1976) (petitioner has the burden of proving that he was prejudiced by the variance between counsel's opening statement and his conduct at trial when counsel suggested in opening statement that he would present an alibi defense; however, "while the comment was unfortunate, it was harmless beyond a reasonable

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doubt" when viewed in the context of the entire trial); *United States v. Crowley*, 529 F.2d 1066, 1070-71 (3d Cir.), *cert. denied*, 425 U.S. 995, 96 S. Ct. 2209, 48 L.Ed.2d 820 (1976) (harmless error doctrine applies to denial of counsel at hearing on motion to withdraw guilty plea when the defendant alleges neither that he is innocent or that his original plea was involuntary and when it is clear that the defendant is not entitled to withdraw his guilty plea). But see, *Boyer v. Patton*, 579 F.2d 284, 288-89 (3d Cir. 1978) (involving prosecutorial comments on the defendant's silence at the time he was arrested—in which the court has held that the facts "demand the finding that [the defendant] was prejudiced as a matter of law").

12. The Eighth Circuit's position on this issue was clearly marked in *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974):

> Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first, determining, as we have already done, whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client; and second, determining, as will be done on remand, whether that failure prejudiced his defense. This second step is necessary, we believe, because the failure to investigate—though a constitutional error—might in certain circumstances be a "harmless" one and hence would not justify habeas corpus relief. We are guided in this regard by *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), where the Court fashioned its harmless-constitutional-error rule.

Id. at 218. The court elaborated on this concept:

> We ought not to intervene in the criminal process unless and until it can be shown that the alleged error itself prejudiced the petitioner in obtaining a fair trial. But this is *not* to say that, on remand, petitioner must prove his innocence by even so much as a preponderance of the evidence; nor should we be understood to suggest that the Court may trespass upon what properly would have been the jury's province of weighing the truth or falsity of this evidence at the original trial. What we are saying is that, here, the petitioner must shoulder the burden of showing the existence of admissible evidence which could have been uncovered by reasonable in-

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> vestigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt. . . .
>
> In lieu of such a showing, we hasten to add, the defendant must be allowed to demonstrate that changed circumstances beyond petitioner's control have made it impossible to produce any helpful evidence at this time. The latter circumstances, if proved, would serve to shift to the state the burden of showing the absence of any prejudice in the trial because of the inadequacy of the defendant's counsel.

Id. at 220 (emphasis in original).

The Eighth Circuit has consistently adhered to the *McQueen* Standard. *See, e.g., Ford v. Parratt*, 638 F.2d 1115, 1118 (8th Cir. 1981) (when defendant enters a guilty plea, prejudice inquiry necessarily centers upon whether counsel's failure to investigate prejudiced defendant's ability to make an intelligent and voluntary guilty plea); *Morrow v. Parratt*, 675 F.2d 411, 413-14 (8th Cir. 1978) (petitioner prejudiced by counsel's failure to interview eyewitnesses because the evidence counsel would have discovered thereby "may have completely changed the defense strategy"); *Harshaw v. United States*, 542 F.2d 455, 456-57 (8th Cir. 1976) (petitioner failed to establish he was prejudiced by counsel's failure to conduct a pretrial investigation when record reflected "no allegation of anything such investigation might have been expected to produce and no indication of how its omission, if it occurred, was derelict and prejudicial"; neither was there prejudice from counsel's failure to make frivolous objections).

13. Sitting en banc, the Ninth Circuit in *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974, 99 S. Ct. 1542, 59 L.Ed.2d 793 (1979), explained its approach to the prejudice requirements as follows:

> When the claim of ineffective assistance rests upon specific acts and omissions of counsel *at trial*, as it does in this case, relief will be granted only if it appears that the defendant

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was prejudiced by counsel's conduct.

Id. at 1331 (emphasis added). The court followed this holding with two cautionary comments:

> If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense—prejudice may result from the cumulative impact of multiple deficiencies.
>
> Finally, the requirement that prejudice appear does not mean that relief is available only if the defendant would have been acquitted but for counsel's blunders.

Id. at 1333.

In *Ewing v. Williams*, 596 F.2d 391, 395-97 (9th Cir. 1979), the Ninth Circuit extended in full the holding of *Cooper v. Fitzharris* to ineffective assistance claims predicated on a lack of pretrial preparation, and in *United States v. Altamirano*, 633 F.2d 147, 152-53 (9th Cir. 1980), the court made clear that this standard applies both to direct appeals and collateral attacks. Apparently, however, the court has not clearly articulated the degree of prejudice that must be shown. *Compare Altamirano*, 633 F.2d at 153 (counsel's "many unprofessional acts when reviewed in the context of the entire trial did not deprive appellant of a fair trial," because the defendant's case "depended almost entirely upon his credibility," which was not impugned by counsel's failings), *with Cooper v. Fitzharris*, 586 F.2d at 1341 (Hufstedler, J., dissenting) ("While I do not agree that prejudice must be shown, if the majority nonetheless adopts a harmless error approach, *Chapman v. California* . . . would govern the burden of proving prejudice"; burden would therefore be on prosecution to prove that the constitutional error was "harmless beyond a reasonable doubt.")

14. While the Court of Appeals for the District of Columbia has written extensively on the topic of prejudice, no clear rule emerges from *DeCoster v. United States*, 624 F.2d 196 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), and its progeny. A plurality of the court held that "the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy *affected the outcome of the*

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trial"; thereafter, "the conviction cannot survive unless the government demonstrates that it is not tainted by the deficiency, and that in fact no prejudice resulted"; if the showing by the accused causes the court serious misgivings notwithstanding the absence of a constitutional violation, government may prevail upon showing short of the *Chapman* standard. 624 F.2d at 208 & n. 74 (opinion of Leventhal, J., joined by three judges) (emphasis added). A concurring opinion held that "a defendant must show *substantial unfair prejudice to his defense* resulting from a substantial violation of duty owed him by his counsel," at which point the burden shifts to the government to rebut this showing. *Id.* at 232 (MacKinnon, J., joined by two judges) (emphasis added). The dissent argued that once a petitioner has established his trial counsel's ineffectiveness, the burden is on the government to establish that any error was harmless beyond a reasonable doubt. *Id.* at 290-95 (Bazelon, J., dissenting, joined by one judge).

The en banc court's subsequent interpretation of *DeCoster* adds little:

> [A] majority of the court is of the view that defendant does bear the burden of showing that counsel's substantial breach was likely to have resulted in prejudice to appellant's case. That is the formulation in Judge Leventhal's opinion . . . . It is necessarily included in the burden assigned to defendant in Judge MacKinnon's opinion: that defendant show that he actually suffered "unfair prejudice" as a result of counsel's breach.

United States v. Wood, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc) (per curiam). *Wood* can be read to suggest that the petitioner need not show that he would have been acquitted, but for counsel's incompetence, in order to satisfy *DeCoster's* requirement that he show an effect on "the outcome of the trial": "In order to secure a reversal, appellant must establish some basis for believing that a different kind of preparation would have resulted in the presentation of a contrary line of testimony for the jury's consideration." *Id.* at 559. Subsequent panel opinions are inconclusive on this point. *See, e.g., United States v. Hinton*, 631 F.2d 769, 782-83 (D.C. Cir. 1980) (noting only that under *DeCoster* and *Wood* a defendant must establish that he has suffered "likely prejudice," at which point the government must

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prove beyond a reasonable doubt that the deficiencies were harmless). *But see United States v. Patterson*, 625 F.2d 1046, 1048 (D.C. Cir. 1981) ("No counsel however skillful could have 'affected the outcome' of this case where appellant's identity was fixed by three eyewitnesses to the commission of the offense and no greater number of unidentified alibi witnesses, more than the three presented, would have prevented the inescapable jury finding of guilt.").

15. The Second Circuit requires that "claims of ineffective assistance must be premised on actual, not possible, prejudice to the client." *United States v Aulet*, 618 F.2d 182, 188 (2d Cir. 1980) (following *LiPuma v. Commissioner, Department of Corrections*, 560 F.2d 84, 92 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977)). *Cf. United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976) (when defendants claim that potential conflict of interest on the part of their joint attorney prejudiced their cause, some specific instance of prejudice must be shown before it can be said that they received ineffective assistance).

On some occasions, the Second Circuit has cited this rule in rejecting ineffective assistance claims because there has been *no* showing of prejudice. *E.g., Aulet*, 618 F.2d at 188 ("[H]ad a motion to suppress been made it would have been unsuccessful."); *LiPuma*, 560 F.2d at 92-93 (same). On other occasions, however, the Second Circuit's emphasis on the strength of the prosecution's case approaches an "outcome-determinative" analysis. *See, e.g., United States v. Williams*, 575 F.2d 388, 393 (2d Cir.), *cert. denied*, 439 U.S. 842, 99 SCt. 134, 58 L.Ed.2d 141 (1978) ("Other actions by [counsel], such as his tardy and unsuccessful application for production of a defense witness to discredit [the key prosecution witness], are not, to be sure, actions dictated by the demands of trial strategy. But given the strength of the government's case against [the defendant], it is extraordinarily unlikely that [the defendant] was at all prejudiced by his attorney's judgment."); *United States ex rel. Bradley v. McMann*, 423 F.2d 545, 657-58 (2d Cir. 1970), *cert. denied*, 400 U.S. 994, 91 S.Ct. 464, 27 L.Ed.2d 442 (1971) (rejecting ineffective assistance claim premised on counsel's failure to consult adequately with defendant, which resulted in counsel's failure to verify and bolster an alibi defense, because "[a]ppellant's alleged

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alibi was apparently not disclosed to counsel at a conference several hours before the trial began, but was mentioned for the first time when appellant testified"; moreover, the prosecution's rebuttal testimony "destroyed" the alibi, "thus bel[ying] the claim of prejudice resulting from the belated preparation of his trial counsel").

16. In *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 393 U.S. 849, 89 SCt. 80, 21 L.Ed.2d 120 (1968), the Fourth Circuit held that

> [a]n omission or failure to abide by these requirements [of prompt appointment of counsel, adequate opportunity to prepare a defense, adequate consultation, and appropriate investigation] constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish a lack of prejudice thereby.

Id. at 226. In subsequent cases, the Fourth Circuit appears to have alluded to the prejudice requirement only briefly and obliquely. *See, e.g., Via v. Superintendent, Powhatan Correctional Center*, 643 F.2d 167, 175 (4th Cir. 1981) (finding "obvious" the prejudice the petitioner suffered when counsel pressured him into pleading guilty in part because counsel was unprepared to try the case: "Via had a right to plead not guilty and go to trial . . . . He was prejudiced when this right was frustrated because his counsel was unprepared to represent him effectively."); *Marzullo v. Maryland*, 561 F.2d 540, 546 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (noting simply that attorney's failure to exclude jury during interrogation of the prosecuting witness about the crime charged in another rape indictment "failed to protect [the defendant] from the prejudicial effects of the jury's exposure to the first rape charge").

17. On at least one occasion, the First Circuit has declined to grant habeas relief at least in part on grounds that there had been no showing of prejudice. *United States v. Ritch*, 583 F.2d 1179, 1181 (1st Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978) (petitioner had demonstrated no prejudice from counsel's failure to file suppression motion because motion would have been denied; neither was he prejudiced by counsel's failure to interview potential defense witnesses because the

(Footnote continued from preceeding page)
substance of their testimony was in fact presented to the jury). One week later, the First Circuit noted that "[t]he circuits are split on the question of whether an infraction of the sixth amendment right to effective assistance can ever be treated as harmless error, and if so, which party has the burden of proof." *United States v. Bosch*, 584 F.2d 1113, 1122 (1st Cir. 1978). But the court concluded that because "the error was clearly not harmless in the present case, we leave for another day the issue of whether deprivation of effective assistance can ever constitute harmless error." *Id.* at 1123.

18. In *United States ex rel. Healey v. Cannon*, 553 F.2d 1052, 1057 n. 7 (7th Cir.), *cert. denied*, 434 U.S. 874, 98 S.Ct. 221, 54 L.Ed.2d 153 (1977), the court rejected the conclusion of an Illinois appellate court that any mistaken advice afforded the petitioner constituted harmless error due to the overwhelming evidence of guilt; the court noted that "the harmless error doctrine is patently inapplicable to the claimed deprivation of a due process right so fundamental as the effective assistance of counsel." Yet in denying habeas relief in *United States v. Berkwitt*, 619 F.2d 649, 659 (7th Cir. 1980), the court relied in part on the petitioner's failure "to support his contention [of ineffective assistance] with any specific instance of prejudice." And in *United States v. Cooper*, 580 F.2d 259, 263 n.8 (7th Cir. 1978), the court noted that "[t]here has been no showing by appellant whatsoever that a defense of insanity would have been meritorious and that waiver of such a defense [by counsel] was prejudicial." Finally, in *United States v. Ingram*, 477 F.2d 236, 240 (7th Cir.), *cert. denied*, 414 U.S. 840, 94 S.Ct. 94, 38 L.Ed.2d 76 (1973), the court explicitly rejected an ineffective assistance claim on grounds that none of counsel's five purported failings had been prejudicial.

19. In *United States v. Porterfield*, 624 F.2d 122 (10th Cir. 1980), the Tenth Circuit rejected the suggestion that

> "prejudice" is a second tier in the test of incompetency. Reasonable diligence and skill is the test. It would be a mockery in this case to say that the defendant was clearly guilty and that the incompetence of counsel made no difference. Where, as here, the incompetence of counsel is persuasive, the defendant ought not to be required to prove pre-

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> judice on top of the inadequacy. The burden should be on the government to establish the lack of prejudice . . . . Nor is this a case in which discrete trial errors had been committed. *Cf. Cooper v. Fitzharris* . . . .

Id. at 125. In *United States v. Golub*, 638 F.2d 185 (10th Cir. 1980), the court stopped short of holding that prejudice is never relevant, but declined to require such a showing in the case before it: "[P]roof of specific prejudice is not always required in order to render assistance of counsel ineffective, particularly when, as here, the record establishes that trial counsel simply did not have adequate time to prepare for trial." *Id.* at 190. In that case, "[t]he surrounding circumstances, in and of themselves, evidence[d] the prejudice without further proof." *Id.* Most recently, however, the Tenth Circuit has indicated that both of these holdings may be "questionable" in the light of *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), and decisions from other circuits. *See United States v. King*, 664 F.2d 1171, 1173 (10th Cir. 1981); and *United States v. Payne*, 641 F.2d 866, 867-68 (10th Cir. 1981).

20. The Sixth Circuit appears to be alone in failing to require any showing of prejudice from counsel's ineffective representation. In *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), the Sixth Circuit held that "[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel." *Accord, United States v. Yelardy*, 567 F.2d 863, 865 n. 1 (6th Cir.), *cert. denied*, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978). *Cf. United States v. Sumlin*, 567 F.2d 684, 688-89 (6th Cir. 1977), *cert. denied*, 435 U.S. 932, 98 S. Ct. 1507, 55 L.Ed.2d 529 (1978) (finding harmless beyond a reasonable doubt the admission of evidence that petitioner claimed should have been suppressed because it was obtained from defendant by FBI agents while defendant was represented by allegedly ineffective counsel). Although the court reaffirmed *Beasley's* holding in *McKeldin v. Rose*, 631 F.2d 458, 460-61 (6th Cir. 1980), *cert. denied*, 450 U.S. 969, 101 S.Ct. 1488, 67 L.Ed.2d 619 (1981), the court qualified it by holding that "[w]here the error occurs at a preliminary hearing in state proceedings and the state invokes harmless error as a

The instant case presents an appropriate vehicle for resolution of this conflict among the circuits, because the petitioner demonstrated prejudice,[11] but

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reason for denying relief, a harmless error analysis is required." Of course, the general rule recognized in the Sixth Circuit may be subject to modification after *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), discussed *infra* in text. *Cf. Turner v. Engel*, 673 F.2d 1331 (6th Cir. 1981) (citing in dicta *Walker v. Solem*, 648 F.2d 1188, 1189 (8th Cir. 1981), for the proposition that the petitioner "must show both incompetence and material prejudice resulting from the incompetence in order to prevail on his claim.")

11. While it is difficult if not impossible, to determine the full range and course of trial preparation, had petitioner been permitted sufficient time to prepare, as noted in the petition for rehearing, the following exculpatory evidence which remained unknown to defense counsel until after the trial, would have been presented.

1. Tellco was run by Norman Forsyth not Orofino;

2. Orofino had no authority in the company. All power including signatory power for the bank account was in Forsyth who was the President;

3. When the company moved its offices to 39 Broadway, Forsyth refused to give Orofino an office and instructed this co-defendant not to allow Orofino to use his office;

4. Forsyth told the others involved not to associate with Orofino;

5. Forsyth was secretive about investments collected and commissions paid. Forsyth would take Sherlock outside of the presence of the others including Orofino whenever investments were to be discussed.

6. Forsyth had told everyone involved that money raised from the sale of notes would be used to purchase raw cotton;

7. Orofino continually begged Forsyth for money to buy raw cotton. Orofino told Forsyth that if they just had 100 bales per month the cotton company would be in great financial condition;

8. Orofino strongly objected to a trip for potential investors to view the Italian cotton mill over the July 4, 1977 weekend. Orofino told Forsyth the money should be used to buy cotton;

the Second Circuit rejected that claim based upon its rule that the defendant must demonstrate actual particularized instances of prejudice and not merely the possibility of prejudice. See *United States v. Aulet*, 618 F.2d 182, 188 (2d Cir. 1980); *United States v. Rastelli*, 551 F.2d, 902, 906 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977).

By way of contrast, the decision of this case in the District of Columbia would undoubtedly have resulted in a reversal of petitioner's conviction. The District of Columbia Circuit requires only that a defendant demonstrate "likely prejudice" flowing from ineffective assistance of counsel. *United States v. Hinton*, 631 F.2d 769, 782-83 (D.C. Cir. 1980).

There also exists a split among the circuits concerning the minimum standard of competency which must be displayed by a defense counsel in a criminal case, in order to satisfy the Sixth Amendment requirement of effective assistance of counsel. The disarray among the circuits was noted by Justice White with whom Justice Rehnquist joined dissenting from this Court's denial of certiorari in *Maryland v. Marzullo*, 435 U.S. 1011, 98 S. Ct. 1885, 56 L.Ed. 2d 394 (1978). Justice White in listing the cases noted at least three different standards which were employed by various Court of Appeals. Since that time the 1st and 10th Circuit Courts of Appeals have abandoned the "mockery, sham or farce" standard. See *United States v. Bosch*,

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9. If Forsyth had listened to Orofino the cotton company would have been in a strong financial position; and

10. The Comptroller of the Italian cotton company had stated that for every dollar invested in raw cotton, three dollars in income is generated.

584 F.2d 1113 (1st Cir. 1978) and *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945, 100 S. Ct. 1342, 63 L.Ed.2d 779 (1980).

Today, the Second Circuit stands alone in adhering to the archaic and unrealistic doctrine that the defendants' Sixth Amendment right to effective assistance of counsel is not violated unless counsel's representation reduces the trial to a mockery, sham or farce.

This Court has repeatedly held that the right to counsel is fundamental to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 83 SCt. 792, 9 L.Ed. 2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 SCt. 55, 77 L.Ed 158 (1932), and that the right to counsel means the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 SCt. 1441, 25 L.Ed. 2d 763 (1970). This court should establish a uniform standard for determining whether this fundamental right has been deprived.

In this case the Circuit Court of Appeals affirmed on the basis that petitioner had not adequately demonstrated prejudice. Therefore, it did not reach the issue of the appropriate standard to be employed in accessing competency of counsel. However, upon reconsideration, after this Court has articulated the appropriate tests in accessing prejudice, the issue of the standard to be employed in determining whether petitioner was deprived of the effective assistance of Counsel, must be addressed.

Because this case presents several fundamental constitution issues which have divided the Circuit Courts of Appeals and because one of those issues is

currently before this Court, certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES L. WEINTRAUB
Attorney for Petitioner
285 Madison Avenue
New York, N.Y. 10017
(212) 679-2988

September, 1983

APPENDIX "A"

ORDER DATED JUNE 20th, 1983

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of June, One Thousand Nine Hundred and Eighty-three.

PRESENT:
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
HON. JOHN MINOR WISDOM,*
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

v.

FRANCIS X. OROFINO,

Defendant-Appellant.

Francis X. Orofino appeals from a judgment of the United States District Court for the Southern

* Senior Circuit Judge of the Fifth Circuit, sitting by designation.

District of New York (Pollack, J.), entered December 2, 1982, convicting him, after a jury trial, of mail, wire, and securities fraud, and conspiracy to commit the same. We affirm.

The trial judge did not deny appellant the effective assistance of counsel or due process of law when he revoked appellant's assigned counsel status and denied the request for a continuance submitted by appellant's subsequently retained counsel. In view of Orofino's failure to show why his cash flow situation rendered him financially unable to retain counsel, the district court's finding that appellant was able to finance his defense was not clearly erroneous. *See* 18 U.S.C. §3006A(c); *United States v. Ellsworth*, 547 F.2d 1096, 1098 (2d Cir. 1976), *cert. denied*, 431 U.S. 931 (1977); *United States v. Rubinson*, 543 F.2d 951, 964 (2d Cir.), *cert. denied sub nom. Chester v. United States*, 429 U.S. 850 (1976). Also, given the brief duration of the trial, the straight-forward nature of the Government's proof, and the relative insignificance of the incidents of prejudice alleged by appellant, the trial court did not abuse its discretion in denying defense counsel's application for a continuance. *See United States v. Bagaric*, __F.2d__, No. 82-1247, slip op. at 3195 n. 21 (2d Cir. April 14, 1983); *United States v. Cicale*, 691 F.2d 95, 106-07 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3749 (April 18, 1983); *United States v. Rastelli*, 551 F.2d 982, 906 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977); *United States v. Bentvena*, 319 F.2d 916, 935 (2d Cir. 1963).

Appellant has failed to establish a violation of the Government's obligation under *Brady*. Inasmuch as Orofino should have known of his confederates' positions with respect to the financial viability of the

Italian company, it cannot be said that the Government suppressed information favorable to him. *See United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3552 (January 24, 1983).

Counts 7 and 8 of the indictment were not factually defective by the omission of the "sale" element of an offense under 15 U.S.C. §773(a). Orofino asserts no prejudice as a result of the omission. *See United States v. Bagaric, supra*, at 3178; *United States v. Carrier*, 672 F.2d 300, 303 (2d Cir.), *cert. denied*, 50 U.S.L.W. 3998.02 (June 21, 1982). Moreover, Count 1 of the indictment details the sales of securities, and the trial judge properly charged the jury on this element of the offense.

Any error by the trial judge in allowing the testimony of Peter Davey and Martin Dillon would be harmless in view of the substantial evidence of Orofino's guilt. Moreover, given the minimal prejudicial effect, if any, of the judge's questioning of Michael Zucker, and the substantial evidence of guilt, any error again would be harmless. *See United States v. Robinson*, 635 F.2d 981, 984-85, 986 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). The exclusion of the opinion testimony of Zucker does not constitute reversible error, inasmuch as any such testimony would go to the appellant's expectation of the future viability of the company, a legally irrelevant issue.

Judgment affirmed.

s/Hon. Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

s/Hon. Lawrence W. Pierce
Hon. Lawrence W. Pierce

s/Hon. John Minor Wisdom
Hon. John Minor Wisdom

(N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.)

APPENDIX "B"

ORDER DATED JULY 21st, 1983

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of July, one thousand nine hundred and eighty-three.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS X. OROFINO, NORMAN T. FORSYTH,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Francis X. Orofino,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro, Clerk

s/Victoria C. Dalton
by Deputy Clerk

APPENDIX "C"

AFFIDAVIT OF PAMELA ROGERS CHEPIGA IN OPPOSITION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v.-

NORMAN FORSYTH, *et al.*,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF N.Y.)

PAMELA ROGERS CHEPIGA, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Southern District of New York and, together with Assistant United States Attorney Carl T. Solberg, I am presently in charge of the prosecution of the above-captioned case. I submit this affidavit in opposition to the motion of defendant Norman Forsyth to dismiss the charges pending against him on the basis of pre-indictment delay. This affidavit is based upon a review of the relevant files of both the United States Attorney's Office and the Federal Bureau of Investigation, as well as on conversations with Assis-

tant United Stats Attorneys Eugene N. Kaplan and Jane Parver.

2. In 1977 during the course of an investigation into sophisticated white collar criminal activity—the principal target of which was the multi-convicted Sy Yoakum Guthrie III—Assistant United States Attorney Eugene N. Kaplan and Federal Bureau of Investigation Special Agent Erick Vail began to receive information concerning the activities of Francis X. Orofino and Norman Forsyth who were then working together under the name Lombard Capital out of an office at 12 East 86th Street in Manhattan. The purchase of an Italian cotton factory was but one of a number of Orofino's and Forsyth's questionable activities which were brought to the attention of the FBI.

3. At approximately the same time, April 1977, the stock of Tellco, a corporation of which Forsyth was President and of which the Italian cotton factory was made a subsidiary, was being traded over-the-counter at 25 cents per share. Within five months the stock skyrocketed to 8 dollars per share and on September 22, 1977 the Securities and Exchange Commission ("SEC") suspended public trading in Tellco stock. Both prior to and following the suspension of trading of Tellco stock the SEC conducted its own independent investigation which culminated in the filing of a civil action, *SEC v. Tellco,* 79 Civ. 6649 (CSH), on December 6, 1979.

4. On December 6, 1977 Assistant United States Attorney Kaplan, in conjunction with the FBI investigation described in Par. 2, *supra,* requested access to the Securities and Exchange Commission's

files on Tellco. Access was granted by the SEC on February 21, 1978.

5. The FBI began to treat the Tellco matter as an independent offshoot of the Guthrie case and conducted its own lengthy and detailed investigation, the focus of which was substantially different from that of the SEC. Upon the completion of its investigation, the FBI on December 27, 1979 submitted a 140 page prosecutive report to the United States Attorney's Office for the Southern District of New York.

6. On March 13, 1980, after reviewing the FBI's prosecutive report, the United States Attorney's Office formally opened a file on the Tellco matter, United States Attorney File No. 80-0892. At approximately the same time Assistant United States Attorney Kaplan was promoted to the administrative position of Deputy Chief of the Criminal Division, and the Tellco investigation was reassigned to Assistant United States Attorney Jane Parver. Although devoting sufficient time to the Tellco investigation to interview dozen of witnesses and to present considerable evidence to the Grand Jury, Assistant United States Attorney Parver was unable to complete the Grand Jury presentation because its complexity demanded a time commitment she was unable to give to it due to the press of other trial and investigative assignments. Consequently, in approximately March 1982, Special Assistant Unitd States Attorney Seth Taube was given primary responsibility for the finalization of the Tellco investigation and was in charge of the matter through July 1982, when the indictment was filed. In July 1982 the case was once again re-assigned when Mr. Taube left the United States Attorney's Office.

7. The investigation was at all times conducted in good faith and at no time was it purposely delayed. All reassignments of the case, with any delays necessarily attendant thereto, were made for valid law enforcement purposes. Indeed, the passage of time and potential fading of recollections makes the prosecution more difficult for the Government, which bears the heavy burden of proving its case beyond any reasonable doubt, than for the defense. While the defense argues that the Government delayed to gain some "tactical advantage" (Traub Aff'd Par. 13), it does not specify or even hypothesize what conceivable advantage the Government could have gained from any delay.

8. In the affidavit and brief submitted on behalf of Forsyth, there are repeated references to his being unrepresented in the SEC proceeding. In fact, the firm of Gusrae, Greene & Kaplan did represent Forsyth at various times during the SEC investigation and when Forsyth appeared at the SEC on August 30, 1978, he refused to answer any questions and invoked his fifth amendment privilege "upon advice of counsel." (SEC Tr., Ex. F. to Traub Aff'd, p. 7). Again, when his deposition in the civil proceeding was taken on May 20, 1981, Forsyth refused to answer any questions and invoked his privilege against self-incrimination. Contrary to the assertion in Par. 3 of the Traub affidavit, Forsyth made no statements in the context of the civil case which could be used against him in this criminal proceeding.

9. Forsyth has long been aware of the possibility of a criminal prosecution; he was never misled by the Government into believing that his liability was exclusively civil. As early as August 30, 1978 Forsyth

was advised by the SEC of a potential criminal prosecution based on the same acts which were the basis of their civil investigation. (See SEC Tr., Ex. F to Traub Aff'd, p. 4). Moreover, on April 12, 1979 Forsyth was interviewed by two FBI agents, whose jurisdiction is exclusively criminal. Finally, on January 7, 1981 Forsyth was subpoenaed by the Grand Jury to produce all corporate books and records for Tellco and several other corporate entities. He appeared in the Grand Jury and did produce the subpoenaed records. At the time he made the Grand Jury production Forsyth—repeatedly characterized in the Traub affidavit as "uncounseled"—was represented by the firm of Grand & Ostrow.

10. The Grand Jury also subpoenaed and obtained all Tellco related records of two brokerage firms, Willis E. Burnside & Co. and Heineman, Franklin, In. These records are in the possession of the United States Attorney's Office and have been made available to Forsyth's counsel. Moreover the personnel of those firms with whom Forsyth dealt, who according to the Government's information did not primarily include Willis Burnside himself, are still in New York and available to testify.

11. In Par. 9 of the moving affidavit, Mr. Traub sttes that "*as a result of* the long standing investigation and Civil Action relating to Tellco" Mr. Forsyth "has lost his home, family and had a heart attack." This statement is most disingenuous. Since this investigation began, Mr. Forsyth was indicted by the State of New York for bribery of a state official, proceeded to trial, and was sentenced to and then served one year in prison, from which he was released only recently. Blithely omitting any reference to these

facts, the defense attributes all of Forsyth's health and family problems solely to the lengthy pendency of the Tellco investigations. The need to stoop to such a distortion of fact is a reflection of the complete lack of substance in the present motion.

s/Pamela Rogers Chepiga
PAMELA ROGERS CHEPIGA
Assistant United States Attorney

Sworn to
August 19th, 1982

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HOFFMAN POLLOK & GASTHALTER
ATTORNEYS AT LAW
477 MADISON AVENUE
NEW YORK, N. Y. 10022
TEL. 212 688-7788

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SUPREME COURT, U.S.

EDWARD GASTHALTER
JOHN L. POLLOK
JEFFREY C. HOFFMAN
ANNETTE FERSTENBERG

ARTHUR L. MASS
OF COUNSEL

November 15, 1983

A-220
83-473

Hon. Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Francis X. Orofino v. United States of America
No. 83-473

Dear Mr. Stevas:

The petitioner herein has submitted a motion for reconsideration of his application for bail pending certiorari.

Please refer that motion to Mr. Justice White. As the motion to reconsider frequently refers the Court to the original bail motion, it is important that the original motion papers be submitted to Justice White together with the motion to reconsider.

Very truly yours,

CHARLES L. WEINTRAUB

CLW/jd
HPG34

cc: Rex E. Lee
Solicitor General

HPG2/LM

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

----------x

FRANCIS X. OROFINO,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

----------x

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MOTION

A-220

MOTION OF THE PETITIONER FOR RECONSIDERATION OF THIS COURT'S ORDER DENYING BAIL PENDING DETERMINATION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Comes now the petitioner, Francis X. Orofino, by and through his undersigned counsel and respectfully moves this Honorable Court to reconsider its denial of his previous application for a stay and bail and upon reconsideration to enter an order staying the mandate from the United States Court of Appeals for the Second Circuit, and setting reasonable conditions for petitioner's release, pending the determination of his writ of certiorari and during the pendency of his appeal should the writ be granted and for such other and further relief as to this Court seems just and proper.

Yours, etc.,

CHARLES L. WEINTRAUB, ESQ.
Attorney for Petitioner
c/o Hoffman Pollok & Gasthalter
477 Madison Avenue
New York, New York 10022
(212) 688-7788

TO:

HON. THURGOOD MARSHALL
Associate Justice
United States Supreme Court

Solicitor General
United States Department of Justice

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

----------x

FRANCIS X. OROFINO,

Petitioner,

-against-

AFFIDAVIT

THE UNITED STATES OF AMERICA,

Respondent.

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CHARLES L. WEINTRAUB, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the State of New York and before the Supreme Court of the United States and I am the attorney for the petitioner, Francis X. Orofino.

2. This affidavit is submitted in support of a motion to reconsider this Court's denial of a stay and bail and to set reasonable conditions for the petitioner's release and staying the mandate.

3. The Petition for Writ of Certiorari was filed in this Court on September 19, 1983. On September 22, 1983, the petitioner moved for a stay and bail pending determination of the writ and that application was denied by your Honor on October 4, 1983. On October 21, 1983, the Solicitor General requested an extention of time to file a response to the petition from October 22, 1983 until

November 21, 1983. (A copy of the letter request is attached as Exhibit "A"). The request was granted on October 24, (Exhibit "B"). (The motion dated September 22, 1983 and the factual and legal analysis contained therein are adopted by the petitioner for purposes of the instant motion). The petitioner is at liberty awaiting a designation to an institution by the United States Bureau of Prison which designation should occur in the near future.

4. The factual and legal analysis contained in the petitioner's initial bail motion remain equally compelling and the petitioner respectfully requests the Court to review that application in reconsidering his request for release pending certiorari.

5. The Bail Reform Act and decisions of this Court cited in the initial application, clearly establish the principal that conditions for release pending certiorari should be set if the petitioner presents no risk of flight and no danger to the community and the petition is not frivolous or for the purpose of delay.

6. As noted, it is virtually conceded that the petitioner poses no risk of flight or danger to the community. The petitioner is almost 78 years old and in poor health. The petitioner, his wife, and their children and grandchildren have all resided in the New York area for many years. Throughout these proceedings, Mr. Orofino

has been released upon posting an unsecured $5,000.00 personal recognizance bond. Throughout every stage of these proceedings, Mr. Orofino has appeared in Court when required and has always been available to the Court. Further, there has never been a contention that this gentleman poses any threat to the community.

7. It is, therefore, apparent that conditions for petitioner's release should be set if the petition is not frivilous or submitted for the purpose of delay. The issues presented in the petition are substantial. As stated therein:

> "This case presents questions of fundamental importance to the administration of criminal justice in the federal Courts: First, whether prejudice must be demonstrated when a denial of the Sixth Amendment right to the effective assistance of counsel is predicated upon insufficient time to prepare for trial; second, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted; and finally, what minimum standard of competency must be displayed by a defense counsel in a criminal case in order to satisfy the Sixth Amendment requirement of effective assistance of counsel.
>
> Despite the fundamental nature of these issues, there exists no clear consensus among the Federal Courts of Appeal."

8. The significance of these issues is underscored by the fact that one of these issues is currently pending before this Court in United States v. Cronic, #82-660, and that the Solicitor General has elected to file a response to the petition and requires additional time to do so.

9. It has been deponents experience that the Solicitor General exercises his right to respond to petitions for writs of certiorari in only a small fraction of the criminal cases before this Court. Therefore, the fact that the Solicitor General has decided to file a response, further confirms the conclusion that the issues presented are substantial.

Further, the filing of a response after a 30 day extention, also results in prolonging the determination of whether certiorari should be granted.

10. As it becomes more apparent that certiorari will be granted, the devestating impact of incarceration upon the petitioner and the irreparable harm which would result therefrom, cannot be discounted. Initially, the time required for the entire proceedings in this Court could exceed the petitioner's minimum period of incarceration rendering any relief meaningless. Secondly, in view of the petitioner's advanced age and poor health, and considering the fact that petitioner's wife has a history of mental disorders and is highly dependent upon him, the impact of incarceration upon this elderly couple would be devastating.

WHEREFORE, it is respectfully requested that this Court enter an order setting reasonable conditions for petitioner's release pending determination of the petition for a writ of certiorari to the United States Court of

Appeals for the Second Circuit and during the pendency of any appeal should the petition be granted and for such other and further relief as to this Court seems just and proper.

CHARLES L. WEINTRAUB

Sworn to before me this
7th day of November, 1983.

NOTARY PUBLIC

LINDA CALIGUIRI
Notary Public, State of New York
No. 41-4706181
Qualified in Queens County
Certificate filed in Queens County
Commission Expires March 30, 1985

83-2261

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

October 21, 1983

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Francis X. Orofino v. United States of America,
No. 83-473

Dear Mr. Stevas:

Pursuant to Rule 29.3 of the Rules of this Court, we respectfully request an extension of time, to and including November 21, 1983, within which to file the response to the petition for a writ of certiorari in this case. The petition was filed on September 19, 1983, and we were served on September 22, 1983. The response is now due on October 22, 1983. The additional time is requested because the draft response was received in this Office on October 20, 1983, and the attorney in this Office to whom the case is assigned also is responsible for preparation of a number of other responses to certiorari petitions.

Sincerely,

Rex E. Lee
Solicitor General

cc: Charles L. Weintraub, Esquire
285 Madison Avenue
New York, New York 10017

EXHIBIT A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

October 24, 1983

The Honorable Rex E. Lee
Solicitor General
U. S. Department of Justice
Washington, DC 20530

RE: Francis X. Orofino v. United States
No. 83-473

Dear Mr. Lee:

Your request of October 21, 1983 for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including November 21, 1983.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

gtb
cc: Charles L. Weintraub, Esq.

EXHIBIT B

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

FRANCIS X. OROFINO,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

RECEIVED
SEP 27 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION

A-220
83-473

MOTION OF THE PETITIONER FOR BAIL PENDING THE DETERMINATION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Comes now the petitioner, Francis X. Orofino by and through his undersigned counsel and respectfully moves this Honorable Court to enter an order setting conditions of bail and staying the mandate from the United States Court of Appeals for the Second Circuit pending the determination of his petition for a writ of certiarori and during the pendency of his appeal should the writ be granted and for such other and further relief as to this Court seems just and proper.

Yours, etc.

CHARLES L. WEINTRAUB, ESQ.
Attorney for Petitioner
285 Madison Avenue
New York, New York 10017
(212) 679-2988

TO:

HON. THURGOOD MARSHALL
Associate Justice
United States Supreme Court

Solicitor General
United States Department of Justice

Application - Denied
Thurgood Marshall 10/4/83

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

FRANCIS X. OROFINO, Petitioner, -against- THE UNITED STATES OF AMERICA, Respondent.	AFFIDAVIT

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

CHARLES L. WEINTRAUB being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the State of New York and before the Supreme Court of the United States and I am the attorney for the petitioner, Francis X. Orofino.

2. I submit this affidavit in support of a motion to set conditions of bail and stay the mandate of the United States Court of Appeals for the Second Circuit, pending determination of the petition for a writ of certiarori and during the pendency of the appeal to the United States Supreme Court should the writ be granted.

3. The petitioner has already filed a petition for a writ of certiarori with this Court on September 19, 1983. (A copy of the petition is annexed as Exhibit A and is incorporated herein.)

4. The facts underlying petitioner's conviction and the merits of his

request that this Court review his case are fully set forth in the petition and only portions thereof will be alluded to herein.

5. The petitioner had appealed from a judgment entered on December 7, 1982 convicting him, after a jury trial in the United States District Court for the Southern District of New York of various counts of mail and wire fraud, in violation of Title 18, United States Code, Sections 1341 and 1343, sale of unregistered securities, in violation of Title 15, United States Code, Sections 77(e) and 77(x), inducing investors to travel in interstate commerce in execution of a scheme to defraud, in violation of Title 18, United States Code, Section 2314 and conspriacy to commit those offenses in violation of Title 18, United States Code, Section 371. Petitioner was sentenced on each count to serve concurrent five-year terms of imprisonment to be followed by concurrent five-year terms of probation. He was also subjected to committed fines totalling $73,000.00. The judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit in an opinion entered on June 20, 1983 (Appendix A attached to the petition for a writ of certiarori.) and a petition for rehearing was denied without opinion on July 21, 1983 (Appendix B attached to the petition for a writ of certiarori.). A motion for bail pending the petition for certiarori was denied without opinion by the United States Court of Appeals for the Second Circuit on September 1, 1983 (A copy of the order denying the motion for bail is attached hereto as Exhibit B.). Petitioner is at liberty pending a surrender order.

6. The petitioner recognizes that there is no automatic right to bail after a conviction. Nevertheless, it is well established that bail should only be denied for the strongest reasons:

> While there is no automatic right to bail after conviction, Bowman v. United States, 13 L Ed 2d 171, 85 S ct. 232 (1964), "the command of the Eighth Amendment 'that excessive bail shall not be required * * * 'at the very least obligates Judges passing upon the right to bail to deny such relief only for the strongest of reasons. (Sellers v. United States, 89 S.Ct. 36, 38, 21 L.Ed.2d 64, 66 (1968) (Black, J. in chambers)). The Bail Reform Act of 1966, 18 USC §3146, 3148, further limits the discretion of the Court or Judge to deny bail, as it provides that a person shall be entitled to bail pending appeal, if that appeal is not frivolous or taken for delay or unless the Court or Judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or the community.

Harris v. United States, 404 U.S. 1232, 1232-33, 92 S.Ct. 10, 30 L.Ed.2d 25 (1971) (Douglas, J., in chambers); see also Truong Dinn Hung v. United States, 439 U.S. 1326, 99 S.Ct. 16, 58 L.Ed. 2d 33 (1978) (Brennan, J., in chambers). It is thus clear that if the petitioner presents no risk of flight or threat to any individual or the community and that the petition is not frivolous or for the purpose of delay, this Court should set reasonable conditions for the petitioner's release.

7. It has been virtually conceded since the inception of this litigation that the petitioner poses no risk of flight nor any danger to any individual or community. In fact from

the time of arraignment on, the petitioner had been released after signing a $5,000.00 personal recognizance bond which was not secured by any collateral or co-signors. The indictment in this case was handed up July 14, 1982. The petitioner has, therefore, been at liberty pursuant to a personal recognizance bond in a nominal amount for more than a year without any indication of flight and without any claim of danger to the community. Throughout that entire fourteen (14) month period, the petitioner scrupulously adhered to all of the conditions of release. He appeared in Court whenever required and was always available to the Court throughout the proceedings.

8. The petitioner, Francis X. Orofino will be 78 years of age in December, 1983. He and his family, a very close knit unit, have resided in the New York area for more than 20 years and in the United States for their entire lives. Mr. Orofino and his wife Lillian have enjoyed a stable marriage of 47 years. They have three (3) sons each of whom is married with families of their own residing in the New York area and maintain close contact with their parents. In fact, subsequent to his conviction, Mr. Orofino has often stated that his remaining happiness in life is his enjoyment of his children and grandchildren and the knowledge that he could emotionally support his wife during this time of crises.

9. Mr. Orofino's incarceration, even for a short period of time pending certiarori, would be devestating to the entire family. Both Mr. and Mrs. Orofino are in poor health.

While Mr. Orofino's difficulties are primarily physical, Mrs. Orofino's difficulties are primarily psychdogical. Mr. Orofino suffers from a variety of diseases including, hypertension, cardiomegaly, osteonecosis (right knee), chronic obstructive pulmonary discease, a hiatus hernia which has recently been surgically repaired but requires continued medical attention because of a space remaining behind the incision which will cause complications without proper treatment, duodenitis and arteriosclerotic heart disease. (See Exhibits C and D attached hereto) In addition, Mr. Orofino suffers from cerebral arteriosclerosis (See Exhibit E) and is currently under treatment for excruciating pain that has immobilized him for periods of time and has centered in both of his hips (See Exhibit F). The exact cause of the pain in his hips has not been diagnosed and the treating physician has recommended that Mr. Orofino be admitted to a hospital for further testing once the wound from the surgery to repair the hernia has fully healed. Mr. Orofino's health disorders are so severe that Dr. Dolger concluded that "incarceration would be life threatening". (Exhibit E)

10. On the otherhand, Mrs. Orofino's difficulties involve a long history of severe depression requiring intermittent institutionalization and treatment with antipsychotic drugs. (See Exhibits G and H attached hereto.) While the threat of a five-year prison sentence for a man who is almost 78 years of age has predictably caused depression in both Mr. and Mrs. Orofino, Lillian Orofino continues to be strongly dependent upon her husband

for emotional support. The bonds that are forged over 47 years of marriage, the rearing of three (3) sons, each of whom is a productive member of society with his own family, and all of the joys and heartaches which are a part of these endeavors, become so strong that we often see the rapid decline and indeed the demise of one spouse shortly after the loss of the other. Because of Mrs. Orofino's struggle with depression and her dependence upon her husband, it is fair to infer that the bond attaching the Orofino's is so strong that its severence by Mr. Orofino's incarceration may well shatter and destroy Lillian Orofino.

11. The considerations of age health and family ties clearly demonstrate the irreparable harm which may well flow from any period of incarceration pending the determination of the petition for writ of certiarori and any other proceedings in this Court. Those same facts establish what has been recognized throughoutthe proceedings, that Mr. Orofino presents no risk of flight and no danger to the community or to any individual.

12. Analyzing these facts in light of the Bail Reform Act and this Court's pronouncements concerning its application subsequent to conviction, virtually requires that conditions of release be established unless it is demonstrated that the issues presented in the petition are frivolous or were filed for the purpose of delay.(See Paragraph 6) However, an analysis of the issues presented in the petition demonstrates that the issues are indeed meritorious and that petition was not filed for the

purpose of delay. As noted in the petition:

This case presents questions of fundamental importance to the administration of criminal justice in the federal Courts: First, whether prejudice must be demonstrated when a denial of the Sixth Amendment right to the effective assistance of counsel is predicated upon insufficient time to prepare for trial; second, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted; and finally, what minimum standard of competency must be displayed by a defense counsel in a criminal case in order to satisfy the Sixth Amendment requirement of effective assistance of counsel.

Despite the fundamental nature of these issues, there exists no clear consensus among the Federal Courts of Appeal .

13. Not only does this case present three constitutional issues, each of those issues is of fundamental importance to the administration of criminal justice in the Federal Courts because there exists a divergence of opinion among the Circuit Courts of Appeal concerning each of those issues. Significantly, one of those issues is currently under consideration by this Court. (See United States v. Conic, #82-660).

14. Therefore, it is apparent that the petition is not frivolous or presented for the purpose of delay. Considering the issues presented, the age and health of the petitioner and his wife, and the irreparable harm which would result from his incar-

ceration pending the determination of the petition and any other action by this Court, the petitioner respectfully submits that it is appropriate for this Court to establish reasonable conditions for his release.[1]

WHEREFORE, it is respectfully requested that this Honorable Court enter an order setting conditions of bail pending the determination of the petition for a writ of certiarori to the United States Court of Appeals for the Second Circuit and during the pendency of any appeal should the writ be granted and for such other and further relief as to this Court seems just and proper.

CHARLES L. WEINTRAUB

Sworn to before me this
22nd day of September, 1983

MALCOLM CHAFFETZ
Notary Public, State of New York
No. 60-0810625
Qualified in Westchester County
Commission Expires March 30, 19[illegible]

[1] Even if this Court delays a decision of the petition until an opinion is rendered in United States v. Cronic, supra failure to set reasonable conditions for release could result in incarceration of Mr. Orofino for a year or more.

No.

IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS X. OROFINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EXHIBIT A

QUESTIONS PRESENTED FOR REVIEW

1. When a denial of the Sixth Amendment right to effective assistance of counsel has been demonstrated based upon insufficient time to prepare a complex fraud prosecution for trial, must prejudice be demonstrated before relief will be granted?

2. When a denial of the Sixth Amendment right to effective assistance of counsel has been demonstrated based upon insufficient time to prepare a complex fraud prosecution for trial, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted?

3. What minimum standard of competency must be displayed by a defense counsel in a criminal case, in order to satisfy the Sixth Amendment requirement of effective assistance of counsel?

4. Should this Court resolve a split of authority among the Courts of Appeal regarding each of the preceding questions?

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Appendix C—Affidavit of Pamela Rogers Chepiga In Opposition to Motion 7a

CASES CITED

Beasley v. United States, 491 F.2d, 687 (6th Cir. 1974) 10 n.8

Dyer v. Crisp, 613 F.2d 275 (10th Cir.) (en banc) *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980) 23

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1983

FRANCIS X. OROFINO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Francis X. Orofino petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not reported.

JURISDICTION

The opinion of the Court of Appeals was entered on June 20, 1983, and a petition for rehearing was denied on July 21, 1983 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

STATEMENT

On July 14, 1982, the petitioner and four co-defendants were charged in a 15 count indictment with mail fraud in violation of title 18 U.S.C. 1341, wire fraud in violation of 18 U.S.C. 1343, sale of unregistered securities in violation of 15 U.S.C. Sections 77e and 77x, inducing investors to travel in interstate commerce in execution of a scheme to defraud in violation of 18 U.S.C. 2314, securities fraud in violation of 15 U.S.C. Sections 78j(b), 78ff, and 14 C.F.R. 240.10b-5 and a conspiracy encompassing all of the above offenses in violation of 18 U.S.C. 371. The allegations of the indictment principally involve activities of a publicly traded corporation, Tellco Information Service, Inc. ("Tellco"), its wholly owned subsidiary Vitorio Widemann International ("VWI"), and an Italian cotton factory, Cotonificio Vitorio Widemann & Co. ("Cotonificio"), during the period of April through September, 1977.

It is alleged that the defendants sold promissory notes of VWI convertible into Tellco stock by misrepresenting to the investors that VWI was the owner of Cotonificio; that Tellco was a promising new company which by acquiring other companies would become a mini-conglomerate worth millions of dollars,

and by failing to disclose that Cotonificio was in desperate financial straits and had suffered losses in the past two years and that Tellco did not intend to contribute capital to Aegis Print Works, Inc. ("Aegis") as required by the agreement through which Tellco had acquired Aegis.

It is further alleged that the proceeds of the sales of convertible promissory notes were used to purchase the stock of Tellco on the over-the-counter market, in order to artificially inflate the price of Tellco stock, and that the promissory notes were not registerd with the Securities and Exchange Commission.

Finally, it is alleged that Forsyth and Orofino fraudulently entered into agreements to purchase raw cotton for Cotonficio from two cotton dealers, Volkart and Molsen and through misrepresentations induced these dealers to deliver cotton which was not fully paid for or which was paid for in part through checks drawn on bank accounts with insufficient funds.

The allegations of the indictment were the subjects of investigations by three Federal agencies: The Securities and Exchange Commission, the United States Attorney's Office for the Southern District of New York, and the Federal Bureau of Investigation, spanning five years.

On September 22, 1977, the Securities and Exchange Commission suspended the trading in Tellco stock. In fact, the SEC had commenced an investigation of Tellco prior to that date and the investigation continued until December 6, 1979, when a civil action was commenced in the United States District Court for the Southern District of New York, *SEC v. Tellco*,

et al., 79 Civ. 6649 (CSH), (App. C, *infra* at 8a).

The SEC conducted an in depth investigation which included taking testimony from more than fifty people and requiring the production of numerous books and records.

Also in 1977, the Federal Bureau of Investigation began to receive information about Norman Forsyth and Francis X. Orofino in the course of an investigation of "sophisticated white collar criminal activity." (*Id.* at 8a). On December 6, 1977 the Federal Bureau of Investigation and the United States Attorney's Office for the Southern District of New York requested access to the SEC's Telico file. On February 21, 1978, the SEC permitted the FBI and the United States Attorney to have access to the Telico file. Over the course of the next twenty-two months, the FBI conducted an extensive investigation which culminated in submission of a one hundred forty page prosecutive memorandum to the United States Attorney's Office on December 27, 1979. With the FBI's one hundred forty page report in hand and with the availability of thousands of pages of transcripts generated by the SEC investigation, the United States Attorney's Office opened a formal file on the Telico case on March 13, 1980. (*Id.* at 9a).

For the next twenty-eight months the investigation was continued by the United States Attorney's Office assisted by the FBI and at least one compliance examiner of the SEC. Dozens of witnesses were interviewed and considerable evidence was presented to grand juries, but no indictment was returned until July 14, 1982, because the assistant united states attorney assigned to the case was too busy to devote the

time necessary to complete the grand jury presentation "because (of) its complexities." (*Id.* and Tr. at 346).[1]

By August 9, 1982, the petitioner had been represented by two lawyers appointed by the United States Magistrate pursuant to the Criminal Justice Act 18 U.S.C. 3006A (CJA). The first lawyer asked to be relieved because "the papers were so extensive that he would not have the opportunity to properly represent (the petitioner) within the time limits available to him for that purpose." At that time the trial was scheduled to commence on September 30, 1982, at least seven and one-half weeks from the date upon which the first lawyer was relieved. The second attorney appointed by the Magistrte pursuant to the CJA was disqualified by the trial judge on August 9, 1982, because Mr. Orofino had gross income of $48,000.00 per year (8/9/82 tr. at 1).[2] Mr. Orofino was told that he should retain counsel within ten days and that the trial had been adjourned on motion of the counsel for Co Defendant Forsyth to October 18, 1982 (*Id.* at 2).

During the subsequent court appearances Mr. Orofino informed the Court that he had spoken with several attorneys but could not retain counsel because he was unable to raise sufficient funds for a retainer and that the generation of monies by his business was slow. No attempt was made by the prosecution or the Trial Court to determine what assets Mr. Orofino possessed to retain counsel or to establish his ad-

1. All parenthetical references with the prefix "Tr." refer to the trial transcript.
2. "8/9/82 tr." refers to the transcript of the pre-trial conference held on that date.

justed gross income. Instead, the Court repeatedly warned Mr. Orofino that he would be forced to proceed *pro se* if he did not retain counsel, to which Mr. Orofino replied that he was not prepared to defend himself in a complex litigation and that he would do his best to retain counsel. (9/8/82 tr. at 3-6, and 9/21/82 tr. at 3-5).[3]

Mr. Orofino was finally able to raise the bare minimum necessary to retain private counsel on September 28, 1982, 21 days before trial commenced. Trial counsel had to prepare to meet a complex, multi-pronged indictment involving at least three corporations operating on two continents. The United States Attorney's office made available five cardboard boxes of exhibits including books, records, contracts, bank statements, checks, telexes, financial statements, etc., totalling in the thousands of pages of documents. In addition, counsel had access to approximately 5,000 pages of SEC transcripts relevant to the instant case.

Defense counsel's ability to adequately prepare for trial was further complicated by the following facts. During trial preparation counsel spent two days in Italy where depositions of two government witnesses were conducted. He was required to review affidavits, applications and a court order authorizing electronic surveillance pursuant to Title 18 U.S.C. Section 2518 in order to prepare a motion to suppress conversations of the petitioner which the government offered into evidence at trial. Further, defense counsel had to review concensual tape recorded conversations between the petitioner and an undercover FBI agent which the government proposed to use in cross-examination should petitioner testify. Finally, counsel

3. "9/15/82 tr." and "9/21/82 tr." refer to the transcripts of pretrial appearances on the date indicated.

spent many days in preparation for two proposed government witnesses who were not called to trial. James Sherlock, an unindicted co-conspirator, whose testimony before the Security and Exchange Commission, the Attorney General of the State of New York and the Grand Jury was the most extensive of any proposed government witness was never called to trial. And while the government indicated initially that it would call Fred Pro, the subject of the aforementioned electronic surveillance, as a witness to trial the government ultimately indicated that Mr. Pro would not be a witness.

A motion for a 30 day continuance of the trial date based upon counsel's inability to adequately prepare a defense was heard by the Court on October 15, 1982 and denied (10/15/82 tr. *infra*).[4] Also, during the afternoon of Friday, October 15, 1982, the government delivered approximately 5,000 pages of 3500 material to defense counsel.[5]

The trial commenced on October 18, 1982. During the course of the trial the prosecution offered the testimony of 20 witnesses and moved into evidence 115 exhibits.

The government offered proof that from April through September 1977 investors purchased VWI notes convertible to Telco stock without having been informed that the Italian cotton mill Cotonificio was experiencing financial difficulties and had been shut

4. "10/15/82 tr." refers to the transcript for the motion for continuance.

5. Some of the 3500 material duplicated SEC transcription previously in the possession of defense counsel.

down for a period of time. (tr. 55-84, 99-108, 171-73, 185-88, 298-22, 238-42, 246-58, 263-70 and 313-29).

Testimony was also presented that cotton brokers had sustained losses either through the shipment of cotton to Italy which remained undelivered at a time when world cotton prices were declining or because some checks issued by VWI and signed by Norman Forsythe had been returned for insufficient funds (tr. 8-11, 13-14, 23-29, and 31-49).

The defense attempted to establish a good faith defense (tr. 288-89 25-96, and 302-303). The defense case consisted of an expert witness to testify that certain notes issued by the Lombard Capital Corporation to an investor were not signed by the petitioner although they bore his name (tr. at 357-61). The petitioner was convicted of ten counts and sentenced to current terms of five years imprisonment, 5 years probation and a fine of $73,000.00.[6]

The Court of Appeals in an unreported opinion held that the trial Court did not abuse its discretion in denying the application for a continuance "given the brief duration of the trial, the straight forward nature of the government's proof, and the relative insignificance of the incidents of prejudice alleged by appellant. . . ." And that the trial court's conclusion that appellant was capable of financing his defense was not clearly erroneous based upon petitioner's

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(Footnote continued from preceding page)

6. The securities fraud count was dismissed upon motion of the government before trial and four counts were dismissed at the close of the government's case when the government conceded that it had not called the specific investors involved in those charges.

"failure to show why his cash flow situation rendered him financially unable to retain counsel. . . ." (App. A, *infra*, at 1a-2a).

REASONS FOR GRANTING THE PETITION

This case presents questions of fundamental importance to the administration of criminal justice in the federal courts: First, whether prejudice must be demonstrated when a denial of the Sixth Amendment right to the effective assistance of counsel is predicated upon insufficient time to prepare for trial; second, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted; and finally, what minimum standard of competency must be displayed by a defense counsel in a criminal case in order to satisfy the Sixth Amendment requirement of effective assistance of counsel.

Despite the fundamental nature of these issues, there exists no clear consensus among the Federal courts of Appeals.

The first issue presented is currently before this court. In *United States v. Cronic*, 675 F2d 1126 (10th Cir. 1982), *cert. granted*, 82-660, the United States Court of Appeals for the Tenth Circuit addressed this issue in a case which is factually indistinguishable from the instant case.[7] The Tenth Circuit concluded

7. In fact, in the instant case the defendant had less time to prepare for trial than in *Cronic* (21 days as opposed to 25) and faced a factually and legally more complex litigation. (The instant case involved three corporations on two continents; between five and ten thousand pages of 3,500 material and documentary exhibits; conducting depositions in Italy; preparation of complex motions to suppress the fruits of court authorized electronic

that Cronic's conviction must be reversed because he was deprived of effective assistance of counsel when the trial court allowed twenty-five days for preparation of a multi-count mail fraud prosecution.

It is thus clear that if the instant case had been decided in the Tenth or Sixth Circuits,[8] the petitioner's conviction would have been reversed and the case would have been remanded for a new trial.[9]

The Tenth Circuit's analysis of the prejudice issue should be adopted by this court because it is both logical and the only realistic way to ensure meaningful and effective representation in criminal cases where the issue of ineffective assistance of counsel is predicated upon insufficient preparation. As stated by the Court in *Cronic*:

> "When circumstances impair a given lawyer's preparation of a defendant's case, the defendant need not show specific errors in the conduct of his defense in order to show ineffective assistance of counsel. See *United States v. King*, 664 F.2d 1171, 1173-73 (10th Cir. 1981); *United States v. Golub*, 638 F.2d 185, 187 (10th Cir.), *reversed on other grounds*, 699 F.2d 207 (10th Cir. 1982). This is an imminently reasonable rule, for there is no way an Appellate Court can say precise-

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(Footnote continued from previous page)

surveillance; and the need to understand business practices and accounting procedures in both Italy and the United States, involving the cotton brokerage and cotton manufacturing industries.)

8. *Beasley v. United States*, 491 F.2d, 687 (6th Cir. 1974).

9. In view of the almost identical factual contents of the instant case, and in *United States v. Cronic*, *Supra*, it may be appropriate for this Court to either join these cases for argument or to hold this petition pending the decision in *Cronic*.

ly how a given case would have been handled by a reasonably diligent and properly prepared lawyer. Prejudice for lack of preparation and experience cannot be nicely weighted." *United States v. Cronic, supra*, at 1128.

Finally, the *Cronic* Court recognized that this rule does not conflict with the holding of this court in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665, 66 L.Ed. 2d 564 (1981). *Morrison* involved the invocation of the most drastic remedy when the Court of Appeals had dismissed the indictment, based upon pre-trial interviews of the defendant outside the presence of counsel which yielded no inculpatory statements. Based upon the fact that the constitutional violation could not even theoretically have effected the trial processes, this Court concluded that dismissal of the indictment was inappropriate. *United States v. Morrison, supra*, 449 U.S. at 365.

In contrast, a denial of effective assistance of counsel based upon inadequate time to prepare for complex litigation is fraught with danger which cannot be retrospectively evaluated without speculation. Nevertheless, the circumstances are such as to permit the reasonable inference that a substantial threat of prejudice may be inferred.

Even if this Court should conclude that prejudice must be demonstrated before relief will be granted, it will still be necessary to resolve a conflict among the Circuits concerning the kind and degree of prejudice which must be shown.[10]

10. The cases are collected and discussed by the Fifth Circuit in *Washington v. Strickland*, 673 F.2d 879, 896-900 n. 11-n.20 (5th

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Cir. 1982).

11. In *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (3d Cir. 1970), the Third Circuit noted that the ineffective assistance inquiry cannot stop with a determination as to whether counsel departed from the standard of normal competence:

> In many instances ineffective assistance of counsel may have had so pervasive an effect on the process of guilt determination that it is impossible to determine accurately the presence or absence of prejudice. In other cases changes in circumstances since the original proceedings beyond petitioners' control, such as the death of a witness who was not called, may make it impossible at the time of the habeas corpus petition to determine prejudice. In such instances a finding of departure from the standard of normal competence requires without more, a new trial. In other cases the failure of counsel may be with respect to a narrow issue or area, and it may well be possible, in the habeas corpus proceeding, to determine whether or not the departure from normal competence was prejudicial .... When a habeas petitioner alleges as a ground for relief the failure of counsel to exercise normal competence in presenting specific trial evidence it is reasonable, we think, to put on petitioner the burden of showing that the missing evidence would have been helpful.

Id. at 1115.

In subsequent cases, the Third Circuit has denied habeas relief when it was clear that no prejudice had been shown. *E.g., United States v. Swinehart*, 617 F.2d 336, 341 (3d Cir. 1980) (no prejudice from failure to file suppression motion because motion would have properly been denied; no prejudice from failure to object to prosecutorial suggestion of defendant's guilt because defendant was not prejudiced by comments). The court has also applied the harmless error doctrine to certain ineffective assistance claims. *E.g., United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 177 (3d Cir.), *cert. denied*, 425 U.S. 997, 96 S. Ct. 2214, 48 L.Ed.2d 823 (1976) (petitioner has the burden of proving that he was prejudiced by the variance between counsel's opening statement and his conduct at trial when counsel suggested in opening statement that he would present an alibi defense; however, "while the comment was unfortunate, it was harmless beyond a reasonable

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doubt" when viewed in the context of the entire trial); *United States v. Crowley*, 529 F.2d 1066, 1070-71 (3d Cir.), *cert. denied*, 425 U.S. 995, 96 S. Ct. 2209, 48 L.Ed.2d 820 (1976) (harmless error doctrine applies to denial of counsel at hearing on motion to withdraw guilty plea when the defendant alleges neither that he is innocent or that his original plea was involuntary and when it is clear that the defendant is not entitled to withdraw his guilty plea). But see, *Boyer v. Patton*, 579 F.2d 284, 288-89 (3d Cir. 1978) (involving prosecutorial comments on the defendant's silence at the time he was arrested—in which the court has held that the facts "demand the finding that [the defendant] was prejudiced as a matter of law").

12. The Eighth Circuit's position on this issue was clearly marked in *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974):

> Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first, determining, as we have already done, whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client; and second, determining, as will be done on remand, whether that failure prejudiced his defense. This second step is necessary, we believe, because the failure to investigate—though a constitutional error—might in certain circumstances be a "harmless" one and hence would not justify habeas corpus relief. We are guided in this regard by *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), where the Court fashioned its harmless-constitutional-error rule.

Id. at 218. The court elaborated on this concept:

> We ought not to intervene in the criminal process unless and until it can be shown that the alleged error itself prejudiced the petitioner in obtaining a fair trial. But this is *not* to say that, on remand, petitioner must prove his innocence by even so much as a preponderance of the evidence; nor should we be understood to suggest that the Court may trespass upon what properly would have been the jury's province of weighing the truth or falsity of this evidence at the original trial. What we are saying is that, here, the petitioner must shoulder the burden of showing the existence of admissible evidence which could have been uncovered by reasonable in-

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> vestigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt. . . .
>
> In lieu of such a showing, we hasten to add, the defendant must be allowed to demonstrate that changed circumstances beyond petitioner's control have made it impossible to produce any helpful evidence at this time. The latter circumstances, if proved, would serve to shift to the state the burden of showing the absence of any prejudice in the trial because of the inadequacy of the defendant's counsel.

Id. at 220 (emphasis in original).

The Eighth Circuit has consistently adhered to the *McQueen* Standard. *See, e.g., Ford v. Parratt*, 638 F.2d 1115, 1118 (8th Cir. 1981) (when defendant enters a guilty plea, prejudice inquiry necessarily centers upon whether counsel's failure to investigate prejudiced defendant's ability to make an intelligent and voluntary guilty plea); *Morrow v. Parratt*, 675 F.2d 411, 413-14 (8th Cir. 1978) (petitioner prejudiced by counsel's failure to interview eyewitnesses because the evidence counsel would have discovered thereby "may have completely changed the defense strategy"); *Harshaw v. United States*, 542 F.2d 455, 456-57 (8th Cir. 1976) (petitioner failed to establish he was prejudiced by counsel's failure to conduct a pretrial investigation when record reflected "no allegation of anything such investigation might have been expected to produce and no indication of how its omission, if it occurred, was derelict and prejudicial"; neither was there prejudice from counsel's failure to make frivolous objections).

13. Sitting en banc, the Ninth Circuit in *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974, 99 S. Ct. 1642, 59 L.Ed.2d 793 (1979), explained its approach to the prejudice requirements as follows:

> When the claim of ineffective assistance rests upon specific acts and omissions of counsel *at trial*, as it does in this case, relief will be granted only if it appears that the defendant

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was prejudiced by counsel's conduct.

Id. at 1331 (emphasis added). The court followed this holding with two cautionary comments:

> If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense—prejudice may result from the cumulative impact of multiple deficiencies.
>
> Finally, the requirement that prejudice appear does not mean that relief is available only if the defendant would have been acquitted but for counsel's blunders.

Id. at 1333.

In *Ewing v. Williams*, 596 F.2d 391, 395-97 (9th Cir. 1979), the Ninth Circuit extended in full the holding of *Cooper v. Fitzharris* to ineffective assistance claims predicated on a lack of pretrial preparation, and in *United States v. Altamirano*, 633 F.2d 147, 152-53 (9th Cir. 1980), the court made clear that this standard applies both to direct appeals and collateral attacks. Apparently, however, the court has not clearly articulated the degree of prejudice that must be shown. *Compare Altamirano*, 633 F.2d at 153 (counsel's "many unprofessional acts when reviewed in the context of the entire trial did not deprive appellant of a fair trial," because the defendant's case "depended almost entirely upon his credibility," which was not impugned by counsel's failings), *with Cooper v. Fitzharris*, 586 F.2d at 1341 (Hufstedler, J., dissenting) ("While I do not agree that prejudice must be shown, if the majority nonetheless adopts a harmless error approach, *Chapman v. California* . . . would govern the burden of proving prejudice"; burden would therefore be on prosecution to prove that the constitutional error was "harmless beyond a reasonable doubt.")

14. While the Court of Appeals for the District of Columbia has written extensively on the topic of prejudice, no clear rule emerges from *DeCoster v. United States*, 624 F.2d 196 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), and its progeny. A plurality of the court held that "the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy *affected the outcome of the*

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trial"; thereafter, "the conviction cannot survive unless the government demonstrates that it is not tainted by the deficiency, and that in fact no prejudice resulted"; if the showing by the accused causes the court serious misgivings notwithstanding the absence of a constitutional violation, government may prevail upon showing short of the *Chapman* standard. 624 F.2d at 208 & n. 74 (opinion of Leventhal, J., joined by three judges) (emphasis added). A concurring opinion held that "a defendant must show *substantial unfair prejudice to his defense* resulting from a substantial violation of duty owed him by his counsel," at which point the burden shifts to the government to rebut this showing. *Id.* at 232 (MacKinnon, J., joined by two judges) (emphasis added). The dissent argued that once a petitioner has established his trial counsel's ineffectiveness, the burden is on the government to establish that any error was harmless beyond a reasonable doubt. *Id.* at 290-95 (Bazelon, J., dissenting, joined by one judge).

The en banc court's subsequent interpretation of *DeCoster* adds little:

> [A] majority of the court is of the view that defendant does bear the burden of showing that counsel's substantial breach was likely to have resulted in prejudice to appellant's case. That is the formulation in Judge Leventhal's opinion .... It is necessarily included in the burden assigned to defendant in Judge MacKinnon's opinion: that defendant show that he actually suffered "unfair prejudice" as a result of counsel's breach.

United States v. Wood, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc) (per curiam). *Wood* can be read to suggest that the petitioner need not show that he would have been acquitted, but for counsel's incompetence, in order to satisfy *DeCoster's* requirement that he show an effect on "the outcome of the trial": "In order to secure a reversal, appellant must establish some basis for believing that a different kind of preparation would have resulted in the presentation of a contrary line of testimony for the jury's consideration." *Id.* at 559. Subsequent panel opinions are inconclusive on this point. *See, e.g., United States v. Hinton*, 631 F.2d 769, 782-83 (D.C. Cir. 1980) (noting only that under *DeCoster* and *Wood* a defendant must establish that he has suffered "likely prejudice," at which point the government must

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prove beyond a reasonable doubt that the deficiencies were harmless). *But see United States v. Patterson*, 625 F.2d 1046, 1048 (D.C. Cir. 1981) ("No counsel however skillful could have 'affected the outcome' of this case where appellant's identity was fixed by three eyewitnesses to the commission of the offense and no greater number of unidentified alibi witnesses, more than the three presented, would have prevented the inescapable jury finding of guilt.").

15. The Second Circuit requires that "claims of ineffective assistance must be premised on actual, not possible, prejudice to the client." *United States v Aulet*, 618 F.2d 182, 188 (2d Cir. 1980) (following *LiPuma v. Commissioner, Department of Corrections*, 560 F.2d 84, 92 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977)). *Cf. United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976) (when defendants claim that potential conflict of interest on the part of their joint attorney prejudiced their cause, some specific instance of prejudice must be shown before it can be said that they received ineffective assistance).

On some occasions, the Second Circuit has cited this rule in rejecting ineffective assistance claims because there has been *no* showing of prejudice. *E.g., Aulet*, 618 F.2d at 188 ("[H]ad a motion to suppress been made it would have been unsuccessful."); *LiPuma*, 560 F.2d at 92-93 (same). On other occasions, however, the Second Circuit's emphasis on the strength of the prosecution's case approaches an "outcome-determinative" analysis. *See, e.g., United States v. Williams*, 575 F.2d 388, 393 (2d Cir.), *cert. denied*, 439 U.S. 842, 99 SCt. 134, 58 L.Ed.2d 141 (1978) ("Other actions by [counsel], such as his tardy and unsuccessful application for production of a defense witness to discredit [the key prosecution witness], are not, to be sure, actions dictated by the demands of trial strategy. But given the strength of the government's case against [the defendant], it is extraordinarily unlikely that [the defendant] was at all prejudiced by his attorney's judgment."); *United States ex rel. Bradley v. McMann*, 423 F.2d 545, 657-58 (2d Cir. 1970), *cert. denied*, 400 U.S. 994, 91 S.Ct. 464, 27 L.Ed.2d 442 (1971) (rejecting ineffective assistance claim premised on counsel's failure to consult adequately with defendant, which resulted in counsel's failure to verify and bolster an alibi defense, because "[a]ppellant's alleged

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alibi was apparently not disclosed to counsel at a conference several hours before the trial began, but was mentioned for the first time when appellant testified"; moreover, the prosecution's rebuttal testimony "destroyed" the alibi, "thus bel[ying] the claim of prejudice resulting from the belated preparation of his trial counsel").

16. In *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 393 U.S. 849, 89 SCt. 80, 21 L.Ed.2d 120 (1968), the Fourth Circuit held that

> [a]n omission or failure to abide by these requirements [of prompt appointment of counsel, adequate opportunity to prepare a defense, adequate consultation, and appropriate investigation] constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish a lack of prejudice thereby.

Id. at 226. In subsequent cases, the Fourth Circuit appears to have alluded to the prejudice requirement only briefly and obliquely. *See, e.g., Via v. Superintendent, Powhatan Correctional Center*, 643 F.2d 167, 175 (4th Cir. 1981) (finding "obvious" the prejudice the petitioner suffered when counsel pressured him into pleading guilty in part because counsel was unprepared to try the case: "Via had a right to plead not guilty and go to trial . . . . He was prejudiced when this right was frustrated because his counsel was unprepared to represent him effectively."); *Marzullo v. Maryland*, 561 F.2d 540, 546 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (noting simply that attorney's failure to exclude jury during interrogation of the prosecuting witness about the crime charged in another rape indictment "failed to protect [the defendant] from the prejudicial effects of the jury's exposure to the first rape charge").

17. On at least one occasion, the First Circuit has declined to grant habeas relief at least in part on grounds that there had been no showing of prejudice. *United States v. Ritch*, 583 F.2d 1179, 1181 (1st Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978) (petitioner had demonstrated no prejudice from counsel's failure to file suppression motion because motion would have been denied; neither was he prejudiced by counsel's failure to interview potential defense witnesses because the

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substance of their testimony was in fact presented to the jury). One week later, the First Circuit noted that "[t]he circuits are split on the question of whether an infraction of the sixth amendment right to effective assistance can ever be treated as harmless error, and if so, which party has the burden of proof." *United States v. Bosch*, 584 F.2d 1113, 1122 (1st Cir. 1978). But the court concluded that because "the error was clearly not harmless in the present case, we leave for another day the issue of whether deprivation of effective assistance can ever constitute harmless error." *Id.* at 1123.

18. In *United States ex rel. Healey v. Cannon*, 553 F.2d 1052, 1057 n. 7 (7th Cir.), *cert. denied*, 434 U.S. 874, 98 S.Ct. 221, 54 L.Ed.2d 153 (1977), the court rejected the conclusion of an Illinois appellate court that any mistaken advice afforded the petitioner constituted harmless error due to the overwhelming evidence of guilt; the court noted that "the harmless error doctrine is patently inapplicable to the claimed deprivation of a due process right so fundamental as the effective assistance of counsel." Yet in denying habeas relief in *United States v. Berkwitt*, 619 F.2d 649, 659 (7th Cir. 1980), the court relied in part on the petitioner's failure "to support his contention [of ineffective assistance] with any specific instance of prejudice." And in *United States v. Cooper*, 580 F.2d 259, 263 n.8 (7th Cir. 1978), the court noted that "[t]here has been no showing by appellant whatsoever that a defense of insanity would have been meritorious and that waiver of such a defense [by counsel] was prejudicial." Finally, in *United States v. Ingram*, 477 F.2d 236, 240 (7th Cir.), *cert. denied*, 414 U.S. 840, 94 S.Ct. 94, 38 L.Ed.2d 76 (1973), the court explicitly rejected an ineffective assistance claim on grounds that none of counsel's five purported failings had been prejudicial.

19. In *United States v. Porterfield*, 624 F.2d 122 (10th Cir. 1980), the Tenth Circuit rejected the suggestion that

> "prejudice" is a second tier in the test of incompetency. Reasonable diligence and skill is the test! It would be a mockery in this case to say that the defendant was clearly guilty and that the incompetence of counsel made no difference. Where, as here, the incompetence of counsel is persuasive, the defendant ought not to be required to prove pre-

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> judice on top of the inadequacy. The burden should be on the government to establish the lack of prejudice . . . . Nor is this a case in which discrete trial errors had been committed. *Cf. Cooper v. Fitzharris* . . . .

Id. at 125. In *United States v. Golub*, 638 F.2d 185 (10th Cir. 1980), the court stopped short of holding that prejudice is never relevant, but declined to require such a showing in the case before it: "[P]roof of specific prejudice is not always required in order to render assistance of counsel ineffective, particularly when, as here, the record establishes that trial counsel simply did not have adequate time to prepare for trial." *Id.* at 190. In that case, "[t]he surrounding circumstances, in and of themselves, evidence[d] the prejudice without further proof." *Id.* Most recently, however, the Tenth Circuit has indicated that both of these holdings may be "questionable" in the light of *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), and decisions from other circuits. *See United States v. King*, 664 F.2d 1171, 1173 (10th Cir. 1981); and *United States v. Payne*, 641 F.2d 866, 867-68 (10th Cir. 1981).

20. The Sixth Circuit appears to be alone in failing to require any showing of prejudice from counsel's ineffective representation. In *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), the Sixth Circuit held that "[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel." *Accord, United States v. Yelardy*, 567 F.2d 863, 865 n. 1 (6th Cir.), *cert. denied*, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978). *Cf. United States v. Sumlin*, 567 F.2d 684, 688-89 (6th Cir. 1977), *cert. denied*, 435 U.S. 932, 98 S. Ct. 1507, 55 L.Ed.2d 529 (1978) (finding harmless beyond a reasonable doubt the admission of evidence that petitioner claimed should have been suppressed because it was obtained from defendant by FBI agents while defendant was represented by allegedly ineffective counsel). Although the court reaffirmed *Beasley's* holding in *McKeldin v. Ross*, 631 F.2d 458, 460-61 (6th Cir. 1980), *cert. denied*, 450 U.S. 969, 101 S.Ct. 1488, 67 L.Ed.2d 619 (1981), the court qualified it by holding that "[w]here the error occurs at a preliminary hearing in state proceedings and the state invokes harmless error as a

The instant case presents an appropriate vehicle for resolution of this conflict among the circuits, because the petitioner demonstrated prejudice,[11] but

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reason for denying relief, a harmless error analysis is required." Of course, the general rule recognized in the Sixth Circuit may be subject to modification after *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), discussed *infra* in text. *Cf. Turner v. Engel*, 673 F.2d 1331 (6th Cir. 1981) (citing in dicta *Walker v. Solem*, 648 F.2d 1188, 1189 (8th Cir. 1981), for the proposition that the petitioner "must show both incompetence and material prejudice resulting from the incompetence in order to prevail on his claim.")

11. While it is difficult if not impossible, to determine the full range and course of trial preparation, had petitioner been permitted sufficient time to prepare, as noted in the petition for rehearing, the following exculpatory evidence which remained unknown to defense counsel until after the trial, would have been presented.

1. Tellco was run by Norman Forsyth not Orofino;

2. Orofino had no authority in the company. All power including signatory power for the bank account was in Forsyth who was the President;

3. When the company moved its offices to 39 Broadway, Forsyth refused to give Orofino an office and instructed this co-defendant not to allow Orofino to use his office;

4. Forsyth told the others involved not to associate with Orofino;

5. Forsyth was secretive about investments collected and commissions paid. Forsyth would take Sherlock outside of the presence of the others including Orofino whenever investments were to be discussed.

6. Forsyth had told everyone involved that money raised from the sale of notes would be used to purchase raw cotton;

7. Orofino continually begged Forsyth for money to buy raw cotton. Orofino told Forsyth that if they just had 100 bales per month the cotton company would be in great financial condition;

8. Orofino strongly objected to a trip for potential investors to view the Italian cotton mill over the July 4, 1977 weekend. Orofino told Forsyth the money should be used to buy cotton;

the Second Circuit rejected that claim based upon its rule that the defendant must demonstrate actual particularized instances of prejudice and not merely the possibility of prejudice. See *United States v. Aulet*, 618 F.2d 182, 188 (2d Cir. 1980); *United States v. Rastelli*, 551 F.2d, 902, 906 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977).

By way of contrast, the decision of this case in the District of Columbia would undoubtedly have resulted in a reversal of petitioner's conviction. The District of Columbia Circuit requires only that a defendant demonstrate "likely prejudice" flowing from ineffective assistance of counsel. *United States v. Hinton*, 631 F.2d 769, 782-83 (D.C. Cir. 1980).

There also exists a split among the circuits concerning the minimum standard of competency which must be displayed by a defense counsel in a criminal case, in order to satisfy the Sixth Amendment requirement of effective assistance of counsel. The disarray among the circuits was noted by Justice White with whom Justice Rehnquist joined dissenting from this Court's denial of certiorari in *Maryland v. Marzullo*, 435 U.S. 1011, 98 S. Ct. 1885, 56 L.Ed. 2d 394 (1978). Justice White in listing the cases noted at least three different standards which were employed by various Court of Appeals. Since that time the 1st and 10th Circuit Courts of Appeals have abandoned the "mockery, sham or farce" standard. See *United States v. Bosch*,

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9. If Forsyth had listened to Orofino the cotton company would have been in a strong financial position; and

10. The Comptroller of the Italian cotton company had stated that for every dollar invested in raw cotton, three dollars in income is generated.

584 F.2d 1113 (1st Cir. 1978) and *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945, 100 S. Ct. 1342, 63 L.Ed.2d 779 (1980).

Today, the Second Circuit stands alone in adhering to the archaic and unrealistic doctrine that the defendants' Sixth Amendment right to effective assistance of counsel is not violated unless counsel's representation reduces the trial to a mockery, sham or farce.

This Court has repeatedly held that the right to counsel is fundamental to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 83 SCt. 792, 9 L.Ed. 2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 SCt. 55, 77 L.Ed 158 (1932), and that the right to counsel means the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 SCt. 1441, 25 L.Ed. 2d 763 (1970). This court should establish a uniform standard for determining whether this fundamental right has been deprived.

In this case the Circuit Court of Appeals affirmed on the basis that petitioner had not adequately demonstrated prejudice. Therefore, it did not reach the issue of the appropriate standard to be employed in accessing competency of counsel. However, upon reconsideration, after this Court has articulated the appropriate tests in accessing prejudice, the issue of the standard to be employed in determining whether petitioner was deprived of the effective assistance of Counsel, must be addressed.

Because this case presents several fundamental constitution issues which have divided the Circuit Courts of Appeals and because one of those issues is

currently before this Court, certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September, 1983

APPENDIX "A"

ORDER DATED JUNE 20th, 1983

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of June, One Thousand Nine Hundred and Eighty-three.

PRESENT:
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
HON. JOHN MINOR WISDOM,*
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

v.

FRANCIS X. OROFINO,

Defendant-Appellant.

Francis X. Orofino appeals from a judgment of the United States District Court for the Southern

* Senior Circuit Judge of the Fifth Circuit, sitting by designation.

District of New York (Pollack, J.), entered December 2, 1982, convicting him, after a jury trial, of mail, wire, and securities fraud, and conspiracy to commit the same. We affirm.

The trial judge did not deny appellant the effective assistance of counsel or due process of law when he revoked appellant's assigned counsel status and denied the request for a continuance submitted by appellant's subsequently retained counsel. In view of Orofino's failure to show why his cash flow situation rendered him financially unable to retain counsel, the district court's finding that appellant was able to finance his defense was not clearly erroneous. *See* 18 U.S.C. §3006A(c); *United States v. Ellsworth*, 547 F.2d 1096, 1098 (2d Cir. 1976), *cert. denied*, 431 U.S. 931 (1977); *United States v. Rubinson*, 543 F.2d 951, 964 (2d Cir.), *cert. denied sub nom. Chester v. United States*, 429 U.S. 850 (1976). Also, given the brief duration of the trial, the straight-forward nature of the Government's proof, and the relative insignificance of the incidents of prejudice alleged by appellant, the trial court did not abuse its discretion in denying defense counsel's application for a continuance. *See United States v. Bagaric*, __F.2d__, No. 82-1247, slip op. at 3195 n. 21 (2d Cir. April 14, 1983); *United States v. Cicale*, 691 F.2d 95, 106-07 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3749 (April 18, 1983); *United States v. Rastelli*, 551 F.2d 982, 906 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977); *United States v. Bentvena*, 319 F.2d 916, 935 (2d Cir. 1963).

Appellant has failed to establish a violation of the Government's obligation under *Brady*. Inasmuch as Orofino should have known of his confederates' positions with respect to the financial viability of the

Italian company, it cannot be said that the Government suppressed information favorable to him. *See United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3552 (January 24, 1983).

Counts 7 and 8 of the indictment were not factually defective by the omission of the "sale" element of an offense under 15 U.S.C. §773(a). Orofino asserts no prejudice as a result of the omission. *See United States v. Bagaric*, *supra*, at 3178; *United States v. Carrier*, 672 F.2d 300, 303 (2d Cir.), *cert. denied*, 50 U.S.L.W. 3998.02 (June 21, 1982). Moreover, Count 1 of the indictment details the sales of securities, and the trial judge properly charged the jury on this element of the offense.

Any error by the trial judge in allowing the testimony of Peter Davey and Martin Dillon would be harmless in view of the substantial evidence of Orofino's guilt. Moreover, given the minimal prejudicial effect, if any, of the judge's questioning of Michael Zucker, and the substantial evidence of guilt, any error again would be harmless. *See United States v. Robinson*, 635 F.2d 981, 984-85, 986 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). The exclusion of the opinion testimony of Zucker does not constitute reversible error, inasmuch as any such testimony would go to the appellant's expectation of the future viability of the company, a legally irrelevant issue.

Judgment affirmed.

s/Hon. Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

s/Hon. Lawrence W. Pierce
Hon. Lawrence W. Pierce

s/Hon. John Minor Wisdom
Hon. John Minor Wisdom

(N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.)

APPENDIX "B"

ORDER DATED JULY 21st, 1983

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of July, one thousand nine hundred and eighty-three.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS X. OROFINO, NORMAN T. FORSYTH,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Francis X. Orofino,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro, Clerk

s/Victoria C. Dalton
by Deputy Clerk

APPENDIX "C"

AFFIDAVIT OF PAMELA ROGERS CHEPIGA IN OPPOSITION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v.-

NORMAN FORSYTH, *et al.*,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF N.Y.)

PAMELA ROGERS CHEPIGA, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Southern District of New York and, together with Assistant United States Attorney Carl T. Solberg, I am presently in charge of the prosecution of the above-captioned case. I submit this affidavit in opposition to the motion of defendant Norman Forsyth to dismiss the charges pending against him on the basis of pre-indictment delay. This affidavit is based upon a review of the relevant files of both the United States Attorney's Office and the Federal Bureau of Investigation, as well as on conversations with Assis-

tant United Stats Attorneys Eugene N. Kaplan and Jane Parver.

2. In 1977 during the course of an investigation into sophisticated white collar criminal activity—the principal target of which was the multi-convicted Sy Yoakum Guthrie III—Assistant United States Attorney Eugene N. Kaplan and Federal Bureau of Investigation Special Agent Erick Vail began to receive information concerning the activities of Francis X. Orofino and Norman Forsyth who were then working together under the name Lombard Capital out of an office at 12 East 86th Street in Manhattan. The purchase of an Italian cotton factory was but one of a number of Orofino's and Forsyth's questionable activities which were brought to the attention of the FBI.

3. At approximately the same time, April 1977, the stock of Tellco, a corporation of which Forsyth was President and of which the Italian cotton factory was made a subsidiary, was being traded over-the-counter at 25 cents per share. Within five months the stock skyrocketed to 8 dollars per share and on September 22, 1977 the Securities and Exchange Commission ("SEC") suspended public trading in Tellco stock. Both prior to and following the suspension of trading of Tellco stock the SEC conducted its own independent investigation which culminated in the filing of a civil action, *SEC v. Tellco*, 79 Civ. 6649 (CSH), on December 6, 1979.

4. On December 6, 1977 Assistant United States Attorney Kaplan, in conjunction with the FBI investigation described in Par. 2, *supra*, requested access to the Securities and Exchange Commission's

files on Tellco. Access was granted by the SEC on February 21, 1978.

5. The FBI began to treat the Tellco matter as an independent offshoot of the Guthrie case and conducted its own lengthy and detailed investigation, the focus of which was substantially different from that of the SEC. Upon the completion of its investigation, the FBI on December 27, 1979 submitted a 140 page prosecutive report to the United States Attorney's Office for the Southern District of New York.

6. On March 13, 1980, after reviewing the FBI's prosecutive report, the United States Attorney's Office formally opened a file on the Tellco matter, United States Attorney File No. 80-0892. At approximately the same time Assistant United States Attorney Kaplan was promoted to the administrative position of Deputy Chief of the Criminal Division, and the Tellco investigation was reassigned to Assistant United States Attorney Jane Parver. Although devoting sufficient time to the Tellco investigation to interview dozen of witnesses and to present considerable evidence to the Grand Jury, Assistant United States Attorney Parver was unable to complete the Grand Jury presentation because its complexity demanded a time commitment she was unable to give to it due to the press of other trial and investigative assignments. Consequently, in approximately March 1982, Special Assistant Unitd States Attorney Seth Taube was given primary responsibility for the finalization of the Tellco investigation and was in charge of the matter through July 1982, when the indictment was filed. In July 1982 the case was once again re-assigned when Mr. Taube left the United States Attorney's Office.

7. The investigation was at all times conducted in good faith and at no time was it purposely delayed. All reassignments of the case, with any delays necessarily attendant thereto, were made for valid law enforcement purposes. Indeed, the passage of time and potential fading of recollections makes the prosecution more difficult for the Government, which bears the heavy burden of proving its case beyond any reasonable doubt, than for the defense. While the defense argues that the Government delayed to gain some "tactical advantage" (Traub Aff'd Par. 13), it does not specify or even hypothesize what conceivable advantage the Government could have gained from any delay.

8. In the affidavit and brief submitted on behalf of Forsyth, there are repeated references to his being unrepresented in the SEC proceeding. In fact, the firm of Gusrae, Greene & Kaplan did represent Forsyth at various times during the SEC investigation and when Forsyth appeared at the SEC on August 30, 1978, he refused to answer any questions and invoked his fifth amendment privilege "upon advice of counsel." (SEC Tr., Ex. F. to Traub Aff'd, p. 7). Again, when his deposition in the civil proceeding was taken on May 20, 1981, Forsyth refused to answer any questions and invoked his privilege against self-incrimination. Contrary to the assertion in Par. 3 of the Traub affidavit, Forsyth made no statements in the context of the civil case which could be used against him in this criminal proceeding.

9. Forsyth has long been aware of the possibility of a criminal prosecution; he was never misled by the Government into believing that his liability was exclusively civil. As early as August 30, 1978 Forsyth

was advised by the SEC of a potential criminal prosecution based on the same acts which were the basis of their civil investigation. (See SEC Tr., Ex. F to Traub Aff'd, p. 4). Moreover, on April 12, 1979 Forsyth was interviewed by two FBI agents, whose jurisdiction is exclusively criminal. Finally, on January 7, 1981 Forsyth was subpoenaed by the Grand Jury to produce all corporate books and records for Tellco and several other corporate entities. He appeared in the Grand Jury and did produce the subpoenaed records. At the time he made the Grand Jury production Forsyth—repeatedly characterized in the Traub affidavit as "uncounseled"—was represented by the firm of Grand & Ostrow.

10. The Grand Jury also subpoenaed and obtained all Tellco related records of two brokerage firms, Willis E. Burnside & Co. and Heineman, Franklin, In. These records are in the possession of the United States Attorney's Office and have been made available to Forsyth's counsel. Moreover the personnel of those firms with whom Forsyth dealt, who according to the Government's information did not primarily include Willis Burnside himself, are still in New York and available to testify.

11. In Par. 9 of the moving affidavit, Mr. Traub sttes that "*as a result of* the long standing investigation and Civil Action relating to Tellco" Mr. Forsyth "has lost his home, family and had a heart attack." This statement is most disingenuous. Since this investigation began, Mr. Forsyth was indicted by the State of New York for bribery of a state official, proceeded to trial, and was sentenced to and then served one year in prison, from which he was released only recently. Blithely omitting any reference to these

facts, the defense attributes all of Forsyth's health and family problems solely to the lengthy pendency of the Tellco investigations. The need to stoop to such a distortion of fact is a reflection of the complete lack of substance in the present motion.

s/Pamela Rogers Chepiga
PAMELA ROGERS CHEPIGA
Assistant United States Attorney

Sworn to
August 19th, 1982

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

FRANCIS X. OROFINO, NORMAN T. FORSYTH,
Defendant-Appellant.

Use short title

82-1431 82-1431

Docket Number

NOTICE OF MOTION

state type of motion

for stay of mandate pending certiorai & pending determination of this motion.

MOTION BY: *(Name and tel. no. of law firm and of attorney in charge of case)*

CHARLES L. WEINTRAUB 679-2988

OPPOSING COUNSEL: *(Name and tel. no. of law firm and of attorney in charge of case)*

ASSISTANT U.S. ATTORNEY
[illegible] SOLBERG 791-0049

UNITED STATES COURT OF APPEALS
FILED
JUL 27 [illegible]
SECOND CIRCUIT

Has consent of opposing counsel:
A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date: 7/28/83
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No
If No, explain why not:
The appeal in this Court has been concluded.
Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☒ No

Judge or agency whose order is being appealed:
POLLACK, J.

Brief statement of the relief requested:

STAY OF MANDATE PENDING APPLICATION FOR A WRIT OF CERTIORARI.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Appearing for: *(Name of party)*
FRANCIS X. OROFINO

Appellant or Petitioner: ☐ Plaintiff ☒ Defendant
Appellee or Respondent: ☐ Plaintiff ☐ Defendant

Signed name must be printed beneath
CHARLES L. WEINTRAUB

Date 7/26/83

RECORDS COPY
PLEASE RETURN TO ROOM 1702

ORDER

(Kindly leave this space blank)

IT IS HEREBY ORDERED that the motion

be and it hereby is granted denied

UNITED STATES COURT OF APPEALS
FILED
SEP 1 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

1 - 8/3

C.J. Feinberg
John Minor Wisdom
Circuit Judge

EXHIBIT B

FRANK M. WEISER, M.D., F.A.C.P., P.C.
715 PARK AVENUE
NEW YORK, NEW YORK 10021
BUTTERFIELD 8-5468

October 5, 1982

Charles Weintraub, Esq.
285 Madison Avenue
New York, NY 10017

RE: Mr. Francis Orofino

Dear Mr. Weintraub:

I examined the above named patient on August, 25th, September 16th, and October 4th, 1982. Based on these evaluations and other studies done at Dr. Simon's office and the Cardiopulmonary Center, I have concluded that this 77 year old male is afflicted with the following diagnoses:

1). Hypertension
2). Cardiomegaly, (Hypertrophic cardiomyopathy)
3). Osteonecosis right knee
4). Chronic obstructive pulmonary disease
5). Hiatus hernia with reflux
6). Duodenitis and arteriosclerotic heart disease

A prolonged, intense trial would be detrimental to his physical state.

Very truly yours,

Frank M. Weiser, M.D.

FMW:lm

EXHIBIT C

GEORGE E. WANTZ, M. D., P. C.
817 EAST 71ST STREET
NEW YORK, N. Y. 10021
—
249-2415

September 15, 1983

Mr. Charles Weintraub
285 Madison Ave.
New York, NY 10017

Dear Mr. Weintraub:

Mr. Francis Orofinio had a large irreducible umbilical hernia. The skin overlying the hernia was very thin and atrophic to such a degree that necrosis was a definite possibility. The patient was also overweight. Because of this general anesthesia was used instead of local to repair the hernia. The hernia was repaired on 8/18/83. A hematoma developed in the wound and this complication has prolonged his convalesence. The hernia occupied a space about the size of an orange and blood accumulated in this space. At first an attempt to treat the hematoma by simple aspiration was tried unsuccessfully. I then opened the wound and evacuated the hematoma. The wound is now healing.

Frequent visits to me are necessary to insure that the wound heals from the bottom and not from the skin. Should the wound heal at the skin level before filling in at the bottom further complications could occur.

I expect in a very short period of time that the wound will have healed completely leaving a perfect scar. I cannot forecast how long this will take. Once healing gets under way, it is rapid and his visits to me will cease.

If you have any further questions please do not hesitate to call.

Sincerely yours,

George E. Wantz, M.D.

GEW:jb

EXHIBIT D

HENRY DOLGER, M.D.
11 EAST 86TH STREET
NEW YORK 28, N.Y.

November 29, 1982

Mr. Charles L. Weintraub, Esq.
285 Madison Avenue
New York, N.Y. 10017

Re: Mr. Francis X. Orofino

Dear Mr. Weintraub:

I examined Mr. Orofino on November 22, 1982 and found him to be suffering from additional evidence of cerebral arteriosclerosis. This was manifest by a history of memory lapses verified clinically by marked alterations in blood flow to the brain on sudden changes in position and fainting on arising quickly from a chair or bed.

His advanced age complicated by hypertension and obesity with the burden of a large abdominal hernia are further problems which will worsen in time.

I feel that Mr. Orofino is so seriously handicapped physically and mentally that incarceration would be life - threatening.

Yours truly,

Henry Dolger, M.D.

EXHIBIT E

Exhibit "F", a letter from Dr. Joseph Markenson, Hospital for Special Surgery, 535 East 70th Street, New York, New York 10021, concerning treatment for pain in both of Mr. Orofino's hips, should be received shortly. It will be immediately forwarded to the Court and counsel for inclusion herein.

EXHIBIT F

WILLIAM H. HAMPTON, M. D.
36 LAKE AVENUE
GREENWICH, CONNECTICUT 06830
AREA CODE 203
TELEPHONE 869-3990

June 26, 1979

Mr. Morris Kuznesof
Chief Probation Officer
207 U.S. Courthouse
Foley Square
New York, N.Y. 10007

Re: 65139- JW

Dear Mr. Kuznesof:

In reply to your inquiry of June 15 concerning Mr. Francis X. Orofino.

Please be advised thatI have treated Mrs. Orofino since December 1978 and she remains under my care at this time. Mrs. Orofino has an involutional psychosis with symptoms of depression, hallucinations and delusions, requiring several periods of in-hospital care and follow-up treatment in my office. She is currently maintained on anti-psychotic medication and is on out-patient psycotherapy, her prognosis is guarded.

Mr. Orofino has not been examined by me, however he has been very supportive in my treatment of his wife. He appears to be an extremely anxious man in regard to his wife's health and it is my considered opinion that involving her in his legal situation would produce emotional problems for her that would be difficult for her to resolve.

Thank you for your consideration in this matter.

Very truly yours,

William H. Hampton, M.D.

cc. Mr. Stanly Fischer
Fischer & Burstein
565 Fifth Ave.
New York, N.Y. 10017

EXHIBIT G

J. WARREN BROWN, M. D.
88 EAST 86TH STREET
APT. 8-C
NEW YORK, N. Y. 10028

August 16, 1983

Mr. Charles L. Weintraub
205 Madison Avenue
New York, New York 10017

Re: Francis and Lillian Orofino

Dear Mr. Weintraub:

I have been Mr. and Mrs. Orofino in psychiatric consultation and have been following them on a weekly basis. Both describe symptoms that are compatible with depression and both appear depressed. In addition, Mr. Orofino is suffering from several physical problems, the details of which you would have to obtain from the physicians who are treating him for these conditions.

One of the major precipitants to both of their depressions has been Mr. Orofino's legal difficulties, which have stressed them individually and as a couple. Should a jail sentence be imposed, the combined effects on Mr. Orofino's mental and physical status might prove life-threatening, given his advanced age. Deprivation of the relationship with her husband could lead to a worsening of Mrs. Orofino's depression and, therefore, her capacity to function.

If I can be of further assistance in this matter, please contact me.

Sincerely,

J. Warren Brown, M.D.

J. Warren Brown, M.D.

JWB:lb

EXHIBIT H

Office - Supreme Court, U.S.
FILED
NOV 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-473

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCIS X. OROFINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the denial of a continuance to afford petitioner's attorney additional preparation time deprived petitioner of the effective assistance of counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-473

FRANCIS X. OROFINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. A petition for rehearing was denied on July 21, 1983 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on September 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of the sale of unregistered securities, in violation of 15 U.S.C. 77e and 77x; three counts of inducing investors to travel in interstate commerce in execution of a scheme to defraud, in violation of 18 U.S.C. 2314; one count of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent five-year terms of imprisonment on each count and five years' probation to commence upon termination of his incarceration. Petitioner also was fined $73,000. The court of appeals affirmed (Pet. App. 1a-4a).

1. The evidence at trial showed that petitioner and four co-defendants, Norman Forsyth, L. Henry Sarmiento, David Heenan, and Stanley Wiklinski, fraudulently sold to the investing public over $400,000 worth of promissory notes of Vitorio Widemann International, Inc. (VWI), that were convertible into the stock of VWI's parent, Tellco Information Services, Inc. (Tellco), a company controlled by petitioner and Forsyth.[1] To induce potential investors to pur-

[1] Forsyth, Sarmiento, Heenan, and Wiklinski were indicted along with petitioner. Following entry of a guilty plea, Forsyth was sentenced to concurrent terms of five years' imprisonment and five years' probation; Sarmiento was sentenced to concurrent three-year terms with all but six months suspended, to be followed by two and one-half years' probation; Heenan was sentenced to concurrent two-year terms with all but four months suspended, to be followed by two years' probation. Charges against Wiklinski were dismissed on the government's motion.

chase the VWI notes, petitioner and his confederates told them of Tellco's acquisition of a large cotton mill, Cotonificio Vitorio Widemann, located near Turin, Italy; portrayed Tellco as a successful venture in which both the Rockefeller family and the Rolling Stones had invested; promised a three-dollar return on every dollar invested; and promised investors that they could obtain the return of their investments at any time. Tr. 74-75, 187-189, 314-315, 330-332. However, petitioner and his confederates failed to inform the investors that Cotonificio had a severe cash flow problem and that during the summer of 1977 the factory was forced to close because it could not pay for the raw cotton it needed to operate (Tr. 170-174). In many instances, they also failed to mention that the VWI notes were convertible into restricted, not common, Tellco stock and therefore were not readily marketable. And, despite their representations, they did not return investors' money when requested to do so (Tr. 81, 107-108). Through such fraudulent representations and omissions, they induced 40 people to invest in excess of $400,000 in the venture; all of the money was lost[2] and some of it was misappropriated by petitioner (Tr. 345).[3]

Petitioner and his co-defendants also attempted to defraud several major cotton suppliers of large quantities of cotton. For example, after inducing one dealer to ship 1200 bales of cotton for Cotonificio to

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[2] For example, a Roman Catholic priest lost a $100,000 fund entrusted to his care to found a religious order devoted to aiding the poor (Tr. 325). Others invested and lost their life savings as the result of the fraud (Tr. 65, 212).

[3] The government presented evidence showing that part of the investment fund was used to pay petitioner's rent at an exclusive apartment (Tr. 343-345, 347-351).

Genoa, Italy, they attempted to obtain its release from the dock without payment. When this proved unsuccessful, Forsyth paid $30,000 and offered a performance bond for the remainder of the amount due. After a mailgram was transmitted stating that the bond was on its way, petitioner requested immediate release of the cotton. The cotton dealer elected to await the arrival of the bond itself. The bond never arrived, and, upon inquiry, the dealer learned that it never had been issued by the insurance company. Tr. 6-10, 23-27.

2. At his arraignment on July 22, 1982, petitioner was represented by an attorney who previously had represented him in a criminal matter and who was representing him in a parallel civil enforcement proceeding involving Tellco brought by the Securities and Exchange Commission. The attorney's notice of appearance specified that the appearance was "for arraignment only." At that time, the trial date was set for September 30, 1982 (Affidavit of Assistant United States Attorney Pamela Rogers Chepiga, Oct. 14, 1982, at 1-2).

On July 29, 1982, petitioner appeared before a federal magistrate and sought appointment of counsel pursuant to the Criminal Justice Act (CJA), 18 U.S.C. 3006A. Petitioner stated in an affidavit that his annual income was $48,000 and that he had $3,000 in savings. The magistrate granted the application for appointment of counsel, but noted that he was unsure whether petitioner qualified for assistance under the CJA and that further consideration of the application was necessary. After two attorneys declined to accept appointment due to other commitments, the district court requested that the CJA attorney on duty that day appear at an August 6 pretrial conference. During the conference, in which

petitioner did not participate, the court found that petitioner's income did not qualify him for CJA representation, dismissed the CJA attorney, and rescheduled the trial for October 18, 1982. On August 9, the district court informed petitioner of the denial of his CJA application and of the new trial date, instructed him to retain an attorney within 10 days, and stated that his attorney should contact the Assistant United States Attorney to obtain access to documents (C.A. App. 35A-36A).

Two days later, an attorney informed the district court that he was planning to represent petitioner as retained counsel. However, during a hearing on September 8, 1982, the attorney stated that he would not be representing petitioner, apparently because of petitioner's failure to pay a retainer (C.A. App. 121A-122A, 127A). The court then reiterated its intent to begin the trial on October 18, impressed upon petitioner the importance of retaining counsel and avoiding further delay, and told him that, if he failed to do so, he would be expected to proceed pro se (C.A. App. 123A-128A).

During a conference on September 21, 1982, petitioner informed the district court that he had made arrangements to retain counsel and acknowledged that he understood that October 18 was the trial date (C.A. App. 145A). The court observed that petitioner had substantial time to obtain a lawyer and again directed him to proceed pro se unless he could find a lawyer willing to proceed on that date (C.A. App. 147A).[4]

---

[4] Petitioner was an attorney who previously had resigned from the bar in the face of disciplinary proceedings (Chepiga Aff. 4).

On September 30, 1982, Charles Weintraub filed a notice of appearance on behalf of petitioner. During the three weeks preceding the trial, Weintraub reviewed discovery documents at the prosecutor's office, conferred with government counsel, and filed numerous motions, including motions to dismiss various counts, a motion to suppress tape recordings, and a motion for a continuance on the basis of insufficient preparation and petitioner's allegedly poor health (C.A. App. 155A-169A). Weintraub also took the deposition of several witnesses at the United States Consulate in Milan, Italy (Pet. 6). The government furnished assistance in connection with these depositions by arranging for space, equipment, and interpreters and other personnel.

On October 15, the district court held a hearing on petitioner's pretrial motions. It denied the motion for a continuance, observing that petitioner had been "playing fast and loose" with the court and that the trial would take no more than three or four days (C.A. App. 179A-188A). Trial began as scheduled on October 18 and consumed three days. The government's evidence consisted principally of the testimony of defrauded investors who testified about petitioner's representations to them (Tr. 55-84, 99-108, 171-178, 185-188, 218-222, 238-242, 246-258, 263-270, 313-329). The defense consisted of the testimony of an expert witness that certain notes issued to an investor were not signed by petitioner, although they bore what appeared to be his signature (Tr. 357-362).

3. On appeal, petitioner argued, inter alia, that he was denied due process and the effective assistance of counsel because of the district court's denial of his motion for a continuance. The court of appeals rejected this claim. It observed that "given the brief

duration of the trial, the straight-forward nature of the Government's proof, and the relative insignificance of the incidents of prejudice alleged by [petitioner], the trial court did not abuse its discretion in denying * * * [the] application" (Pet. App. 2a).

ARGUMENT

Petitioner contends (Pet. 9-22) that he received ineffective assistance of counsel as a result of the district court's denial of his request for a continuance to allow counsel additional time to prepare for trial. The court of appeals correctly rejected this fact-bound claim, finding no abuse of discretion in the circumstances of this case. Further review therefore is not warranted.

1. As Justice Black observed for a unanimous Court in *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940), "[s]ince the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel." To the contrary, the Court has recently reiterated the established principle that trial courts have "broad discretion" in granting or denying a request for a continuance. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9-10. See also *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). No abuse of discretion has been shown here. Petitioner was informed by the district court on August 9, 1982 that his trial was scheduled for October 18, 1982 and that because his annual income disqualified him from receiving assistance under the Criminal Justice Act, he must make arrangements to retain counsel to represent him at trial on that date. The district court again stressed to

petitioner on September 8, 1982 the importance of retaining counsel without further delay. On September 21, 1982, petitioner informed the court that he had "made arrangements" to retain counsel (C.A. App. 145). On September 28, 1982, petitioner retained Charles Weintraub to represent him, and on September 30, Weintraub filed a notice of appearance on behalf of petitioner (Pet. 6). Thus, as petitioner acknowledges (Pet. 6), counsel had 21 days to prepare for trial, a period that was ample in this case, which the court of appeals characterized as "straightforward" (Pet. App. 2a). Nor can petitioner entirely avoid responsibility for his delay of a month and a half in retaining counsel, which substantially contributed to whatever time limitations counsel might have experienced in preparing for trial. See *Ungar* v. *Sarafite*, 376 U.S. at 590.

This is not a case, then, in which counsel was forced by the court to enter the case at such a late date that the appointment of counsel was a sham because counsel was effectively "precluded" from preparing the case and therefore must be conclusively presumed to have rendered ineffective assistance. See *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (right to counsel denied where counsel appointed on day of trial). Compare *Avery* v. *Alabama*, *supra* (right to counsel not denied where trial in capital case was held three days after arraignment and appointment of counsel, despite counsel's request for a continuance based on inadequate time to prepare). Where, as here, counsel has been afforded a period of time to prepare for trial of sufficient length that the assignment of counsel cannot be said to be a sham or mere formality, the Court has explicitly declined "to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel" without some showing of

prejudice. *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970). See also *Morris* v. *Slappy*, slip op. 10; *Mancusi* v. *Stubbs*, 408 U.S. 204, 214 (1972); *Avery* v. *Alabama*, 308 U.S. at 450, 452. Petitioner's contention (Pet. 9-11) that his conviction should be reversed without a showing of prejudice therefore is mistaken. See generally U.S. Br. at 27-28, 30-37, *United States* v. *Cronic*, cert. granted, No. 82-660 (Feb. 22, 1983).[5]

2. Petitioner also contends (Pet. 11-22) that, even if some showing of prejudice is required, the Court should grant certiorari in this case to resolve a conflict in the circuits regarding the nature of the showing of prejudice that is required. The Court already has granted certiorari in *Strickland* v. *Washington*, No. 82-1554 (June 6, 1983), to address that question, and there is no reason for the Court to grant certiorari here as well. This case would not be an ap-

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[5] In *Cronic*, the Tenth Circuit reversed the conviction without finding specific derelictions by counsel that allegedly resulted from inadequate preparation. *United States* v. *Cronic*, 675 F.2d 1126 (1982). As we explain in our brief in *Cronic* (at 44-47), the Tenth Circuit's dispensing with a requirement that prejudice be shown was erroneous and constituted a departure from prior Tenth Circuit precedent involving the denial of a continuance, in which that court has required a showing of a "clear abuse of discretion resulting in manifest injustice." *United States* v. *Gonzales-Palma*, 645 F.2d 844 (10th Cir.), cert. denied, 454 U.S. 861 (1981). Nor, contrary to petitioner's suggestion (Pet. 10 n.9), is there any need to hold this case pending a decision in *Cronic*. In this case, there is no allegation that counsel was inexperienced—a factor upon which the Tenth Circuit placed substantial reliance in *Cronic*. 675 F.2d at 1128, 1129. Moreover, here, unlike in *Cronic*, petitioner himself was largely responsible for the amount of time counsel had to prepare for trial because he did not retain counsel for a month and a half after the district court informed him that he must do so and that the October 18 trial date was firm.

propriate vehicle for consideration of that question in any event. Petitioner did not present his claim of ineffective assistance of counsel to the district court in a motion for a new trial or for relief under 28 U.S.C. 2255. For this reason, there have been no findings by the district court with respect to what functions counsel actually did not have time to perform prior to trial,[6] the significance of any such omissions, or the prejudice, if any, that might have resulted from counsel's allegedly inadequate preparation time.[7] All the Court has before it are petitioner's bare assertions regarding evidence that would have been developed with more preparation time (see Pet. 21 n.11), without any assessment of the significance of the evidence or proof that it in fact was not produced because of the limited time available for preparation.

Moreover, the facts petitioner now asserts (see Pet. 21 n.11) would have been proven at trial if he had more preparation time were not presented to the court below until petitioner filed his rehearing petition (see Pet. for Reh. 13-14), and even then they were not offered in support of petitioner's contention

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[6] For example, although petitioner refers (Pet. 6-7) to 5,000 pages of SEC transcripts, 5,000 pages of materials furnished by the government (which petitioner states (Pet. 7 n.5) overlap to an unspecified extent), and other materials (records, telexes, financial statements, etc.), he does not identify which of those materials counsel was unable to read and digest. Nor does he explain their significance to the case. Presumably, counsel concentrated his efforts on the most important issues in preparing for trial.

[7] Thus, although petitioner discusses (Pet. 6-7) the time counsel devoted to preparing for two witnesses who ultimately were not called by the government, it is difficult to see how petitioner could have been prejudiced by the government's failure to call the witnesses.

that the denial of a continuance deprived him of effective assistance of counsel (see Pet. for Reh. 6-11). They were mentioned in support of a distinct claim that petitioner had been denied his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963). See Pet. for Reh. 11-15. Petitioner there identified these facts as information that counsel learned a co-defendant had told the prosecution and that petitioner contended should have been disclosed to him under *Brady*. Petitioner did not contend that he would have learned of those facts independently if counsel had had more time to prepare for trial. And because most of these assertions—to the effect that co-defendant Forsyth rather than petitioner ran Tellco and that petitioner sought in good faith to obtain cotton for the mill—to the extent they were true, undoubtedly were for the most part known to petitioner himself, they were not undiscoverable by counsel because of assertedly inadequate preparation time.[8]

3. Petitioner also presents (Pet. i, 21-23) the question of what should be the minimum standard of com-

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[8] We note that the government's theory of prosecution was based upon the sale by petitioner of promissory notes of a Tellco subsidiary through false statements and omissions of crucial facts concerning the condition of the cotton-manufacturing operation that formed the basis of the investment. It was irrelevant to the government's case who actually managed Tellco or whether, at some point, petitioner sought to improve its financial condition for the purchase of cotton. Because such matters are therefore of little exculpatory value in this case and because the court of appeals found petitioner's assertions of prejudice to be relatively insignificant in any event (Pet. App. 2a), there is no occasion to hold the petition in this case pending a decision in *Strickland* v. *Washington*, *supra*, which presents the question of the nature of the showing of prejudice that is required in an ineffective assistance of counsel case that does not involve the denial of a request for a continuance.

petence required of defense counsel, noting that the Second Circuit uses the "farce and mockery" test while other circuits have developed different formulations. However, as petitioner concedes (Pet. 23), the court of appeals did not address this question, no doubt because petitioner did not raise it in the court of appeals. Petitioner's contentions regarding his right to counsel were not that counsel was incompetent or committed serious derelictions in his own right [9]—the situation in which the minimum standard of competence required of defense counsel is relevant. He argued only that external restraints resulting from the denial of a continuance prevented counsel from rendering the adequate assistance that otherwise would have been furnished. This case therefore simply does not raise the standard-of-competence issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1983

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[9] Petitioner was represented in the court of appeals and is represented before this Court by the attorney who represented him at trial. That attorney would not be likely to—and ethically could not—attack his own performance in these circumstances.

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No. 83-473

In The
Supreme Court of the United States
October Term, 1983

FRANCIS X. OROFINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1983

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UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

Initially, a mistatement of fact contained in the Government's Brief in Opposition should be corrected. In recounting pre-trial preparation of defense counsel, the government stated:

> "Weintraub also took the deposition of several witnesses at the United States Consulate in Milan, Italy (Pet. 6). The government furnished assistance in connection with these depositions by arranging for space, equipment, and interpreters and other personnel." (Br. 6).

The witnesses deposed in Milan, Italy were government witnesses whose testimony was introduced at trial as part of the prosecution's case-in-chief. Weintraub was present solely to cross-examine those witneses. The accommodations were provided by the government for its own benefit and not as an accommodation to defense preparation.[1]

Relying in part, upon this Court's recent decision in *Morris v. Slappy*, U.S., 103 S. Ct. 1610 (1983), the government contends that the trial court did not abuse its discretion in denying petitioner's motion for a continuance.

Morris v. Slappy, however, involved issue distinct from the ir tant petition.[2] In that case, the defendant was represented by a Deputy Public Defender who vigorously prepared for trial. Six days before trial that Public Defender was hospitalized for surgery and another Public Defender, a senior trial attorney in that office, was assigned to represent him. That attorney immediately notified the defendant of the substitution, reviewed the file and investigation prepared by his predecessor, and conferred with the defendant. *Id.* at 1613.

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1. In fact, the witnesses included the former Comptroller of Cotonificid Vitosario Widemara and an Italian Receiver in Bankruptcy whose testimony involved aspects of Italian business, legal and accounting procedures.

2. This distinction was recognized by the government in *United States v. Cronic, cert. granted*, No. 82-660 (Feb. 22, 1983), a case almost identical with the instant case. In *Cronic* the government argued that its petition should not be held pending determination of *Morris v. Slappy* because the "issues presented . . . are sufficiently distinct." (Pet. 21 n. 13).

After trial commenced, Slappy complained that his lawyer did not have adequate time to prepare his defense, but the Public Defender stated: "I feel I am fully prepared. My own feeling is that a further continuance would not benefit me in presenting the case." *Id.* Later Slappy complained that the first Public Defender was his counsel and not the second. *Id.* at 1614.

In those circumstances, this Court held that it was not an abuse of discretion to deny a continuance. *Id.* at 1614-15.

Unlike *Morris v. Slappy* the instant petition involves complex litigation and a timely motion by counsel who was unable to adequately prepare to meet so broad and complex charges.

The government also contends that the responsibility for the delay in retention of counsel rests in part with the petitioner, and, therefore, he should not be heard to complain about inadequate time to prepare (Br. 8-9).

However, an analysis of the facts surrounding the retention of counsel presents other issues of constitutional dimension counseling in favor of granting certiorari.

The United States Magistrate had appointed counsel for petitioner pursuant to the Criminal Justice Act 18 U.S.C. 3006(A) (CJA). That counsel was disqualified by the trial Court because petitioner had gross income of $48,000.00 per year. Despite repeated protestations of petitioner, appearing *pro se*, that he

could not afford to retain counsel, no inquiry was made to determine petitioner's net income or whether he had sufficient assets to retain counsel in a complex multi-count prosecution involving allegations of stock fraud, mail and were fraud, sale of unregistered securities, inducing investors to travel in interstate commerce and conspiracy (Pt. 5-6).[3]

This suggests that the delay in retaining counsel resulted from petitioners' inability to raise sufficient funds and not due to unwillingness to act. More significantly, several additional issues are presented:

1) Once counsel has been appointed pursuant to the CJA, what inquiry and findings must be made before appointed counsel can be disqualified?
2) Who has the burden of proof in such proceeding?
3) Once appointed counsel has been disqualified and defendant continues to state that he cannot afford to retain counsel, what inquiry must be made?

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3. Obviously, to retain competent counsel in New York City to prepare and try a complex Federal fraud litigation involving corporations in the United States and Italy, requires a very substantial retainer. Members of the Criminal Bar do not enter cases of this magnitude based upon a client's gross income of $48,000 per year which could easily result in adjusted gross income of $20,000 per year when petitioner's office and other overhead costs are considered. In fact, this very problem plagued petitioner. As noted in the Government's Brief, on September 8, 1982 counsel who was to represent petitioner, refused to enter the case because of petitioner's inability to pay a sufficient retainer (Br. 5). Clearly, in determining whether a defendant can afford counsel, the trial Court must weigh the defendant's assets and income against the anticipated costs of trial. *Hardy v. United States*, 375 U.S. 277, 289 n. 7 (1963) (Goldberg, J., concurring); *See also United States v. Rubinstein*, 543 F.2d 951, 964 (2d Cir.), *cert. denied sub nom., Chester v. United States* and *Reynolds v. United States*, 429 U.S. 850 (1976).

4) Who has the burden of proof at that stage of the proceedings and if it falls upon the defendant must the trial Court inform a *pro se* defendant that he has such burden and afford him the opportunity to demonstrate his inability to retain counsel and lack of assets?

In the instant case no inquiry was made into petitioner's ability to retain counsel before appointed counsel was disqualified or after petitioner repeatedly stated that he could not raise sufficient funds to retain counsel. Without such inquiry, it was merely speculation that petitioner was not acting expeditiously.

The right to court appointed counsel if the defendant cannot afford to retain counsel is fundamental. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gidion v. Wainwright*, 372 U.S. 335 (1963). Before disqualifying Court appointed counsel and certainly when a defendant indicates that he cannot afford to retain counsel, the trial Court should conduct a full inquiry to determine whether a defendant has sufficient assets to retain counsel. See *United States v. Martin-Trigona*, 684 F.2d 485 (7th Cir. 1982); *United States v. Anderson*, 567 F. 2d 830, 840 (8th Cir. 1979).

Finally, the government attempted but failed to distinguish the instant case from *United States v. Cronic, cert. granted*, No. 82-660 (Feb. 2, 1983). The Government claims that unlike *Cronic*, there is no allegation by petitioner that trial counsel was inexperienced. (Br. 9 n. 5). However, inexperience of counsel was only one of five (5) factors relied upon by the Circuit Court in *Cronic*. Moreover, it appears that

Cronic was represented by two lawyers prior to and at trial, one of whom had extensive experience in criminal cases. (Pet., *United States v. Cronic* at 4 n.2).

The Government also claims that in the instant case petitioner was largely responsible for the amount of preparation time allowed to counsel (Br. 9 n.5). However, as previously discussed, this raises more issues than it purportedly resolves.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 7, 1983

Charles L. Weintraub